Supreme Court, U.S.
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In The

Supreme Court of the United States

WARD S. LARKIN,

Petitioner,

vs.

MICHAEL JOHNSON and COMPUSA, Inc.,

Respondents.

On Petition For Writ Of Certiorari To the Texas Court Of Appeals For The Fourteenth Judicial District Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

While off-duty working as a security guard for Respondent CompUSA, Inc., Respondent Harris County Deputy Sheriff Michael Johnson arrested Petitioner Ward S. Larkin. Larkin sued Respondents for damages alleging false arrest, false imprisonment, battery, malicious prosecution, and intentional infliction of emotional distress. The Texas courts granted Respondents summary judgment from trial on the grounds that Johnson acted as a Texas peace officer when he arrested Larkin, and that he was entitled to qualified official immunity. The question is whether the Texas courts misapplied the Fighting Words Doctrine from *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), and related U.S. Supreme Court decisions, by holding that "What the hell are you doing?" are fighting words.

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CITATION OF LOWER COURT OPINION

Larkin v. Johnson, 44 S.W.3d 188 (Tex. App. – Houston [14th Dist.] 2001, pet. denied) [App. 1-5]

BASIS FOR JURISDICTION

Pursuant to 28 U.S.C. § 1257(a), the Supreme Court has jurisdiction of this matter because Petitioner seeks enforcement of his rights and privileges under the Constitution of the United States of America. Review on a writ of certiorari is appropriate because the Texas court of appeals has decided an important federal question in a way that conflicts with relevant decisions by this Court.

This petition is filed within 90 days after the Texas Supreme Court's September 27, 2001 decision overruling Petitioner's motion for rehearing from denial of petition for review. [App. 12]

The 133rd Texas District Court granted final summary judgment on April 9, 1998 [App. 7 and App. 8], and denied Petitioner's motion for new trial on June 15, 1998. [App. 14] The 14th Texas Court of Appeals rendered judgment [App. 6] and issued an opinion [App. 1-5] on March 22, 2001. The court of appeals overruled Petitioner's motion for rehearing on April 26, 2001. [App. 9] The Supreme Court of Texas denied Petitioner's Petition for Review on August 9, 2001 [App. 10-11], and denied his motion for rehearing on September 27, 2001. [App. 12]

CONSTITUTIONAL PROVISIONS INVOLVED

1. U.S. Const., amend I:

> Congress shall make no law . . . abridging the freedom of speech, ...

2. U.S. Const., amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

3. U.S. Const., amend. XIV, § 1:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On September 17, 1996 at approximately 7:30 p.m., Petitioner Ward Larkin went to Respondent CompUSA's store at 330 F.M. Road 1960 in Harris County, Texas to buy a mouse for his computer. After he paid for the item the checkout clerk told him to show his receipt to the man at the door. (Trial Clerk's Record (CR) Page 199.) This was Michael Johnson, a uniformed off-duty Harris County deputy sheriff working for CompUSA as a security guard

with the approval of the Harris County Sheriff's Department. (CR 162, 165) Johnson was stationed inside the store a few feet from the exit. (CR 168) His job was to stop each customer leaving the store to make sure that his or her receipt matched the purchased merchandise. (CR 164)

Larkin walked up to Johnson and held his receipt up just below Johnson's eye level. (CR 199) Johnson did not identify himself, ask to see Larkin's receipt, or ask to see Larkin's purchase.[1] (CR 211) Without consent Johnson tried to take Larkin's receipt. Simultaneously, and also without consent, Johnson marked on the receipt with a highlighter pen. Surprised, Larkin pulled the receipt away from Johnson, took a step back and asked, "What the hell are you doing?" (CR 199) Larkin's tone of voice was slightly louder than conversational. (CR 214) Johnson testified in his deposition that neither he nor anyone else in the store was incited to breaching the peace. (CR 177)

After Johnson forcibly marked on and tried to take Larkin's receipt, Johnson politely explained that he was checking the receipts to prevent theft. Larkin said "Oh, OK", then turned from Johnson and walked to the exit. Larkin entered the vestibule to CompUSA's store when Johnson called from behind: "What did you say back there? Do you know that it's against the law to use foul and abusive language with a peace officer?"[2] Larkin

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[1] Johnson claims that he did ask permission to see Larkin's receipt. (CR 152)

[2] There is no Texas statute that expressly prohibits foul and abusive language with a peace officer, and Johnson admitted in deposition that he knows there is no such law. (CR 171)

stopped in the vestibule, turned and faced Johnson. Johnson had also entered the vestibule. Larkin explained that he was surprised by and didn't understand why Johnson marked on and tried to take his receipt. Then Larkin said, "You marked my receipt. Everything's OK. I'm in a hurry. I've got to go." Larkin turned and walked outside onto the sidewalk. Johnson again called Larkin from behind. Larkin stopped on the sidewalk, turned and faced Johnson. Johnson had followed Larkin onto the sidewalk. Johnson identified himself as a Harris County deputy sheriff, and Larkin said, "I'm in a hurry. I've got to go." Larkin turned and walked about 20 feet into the parking lot. Johnson stayed on the sidewalk. Johnson called Larkin again: "I'm a Harris County deputy sheriff, and I order you to come back here." Larkin stopped, turned, faced Johnson and said, "If you want me to stay here, then you will have to arrest me." Larkin turned and walked away. When Larkin reached his car Johnson arrested him, stating "you are under arrest for using foul and abusive language with a peace officer and for evading detention." Larkin was handcuffed and escorted back into CompUSA to an office in the back of the store where Johnson telephoned the Harris County Sheriff's Department. (This whole paragraph is from CR 200-201.)

Larkin was transported to the Harris County Jail and was held in custody until the next morning when he appeared before a magistrate. Larkin was charged with the offense of evading detention under *Tex. Penal Code Ann.*, 38.04(a) ("a person commits an offense if he intentionally flees from a person he knows is a peace officer attempting lawfully to arrest or detain him.") Bond was set at $500, posted and Larkin was released. (CR 201-2)

On September 25, 1996, at his initial appearance before the Harris County Criminal Court at Law No. 6, the charges against Larkin were dismissed for insufficient evidence. (CR 4)

Represented by counsel, Larkin filed suit in the 133rd Texas State District Court against CompUSA, Inc. and Michael Johnson alleging "false arrest, false imprisonment, battery, malicious prosecution, and intentional infliction of emotional distress." (CR 3) In Larkin's response to Johnson and CompUSA's motions for summary judgment Larkin raised the federal question of Freedom of Speech under the Fighting Words Doctrine.

> Whether particular words are fighting words is a question of fact. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573, 62 S.Ct. 766, 770, 86 L.Ed. 1031 (1942); OP. TEX. ATTY. GEN., JM-900 (1988) [See App. 15-18]. The test is what a person of common intelligence would understand to be words likely to cause an average addressee to fight. *Gooding v. Wilson*, 405 U.S. 581 (sic), 523, 92 S.Ct. 1103, 1106, 31 L.Ed.2d 408 (1972); OP. TEX. ATTY. GEN., JM-900. [See App. 15-18] Speech punishable under [*Tex. Penal Code Ann.*] Section 42.01 does not include language that is merely harsh and insulting. *Gooding*, 504 (sic) U.S. at 525, 92 S.Ct. at 1107. Derisive and annoying words can be taken as coming within the purview of the statute only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. *Gooding*, 504 (sic) U.S. at 522, 92 S.Ct. at 1106. (CR 223)

Larkin also raised the specific issue of his right to Freedom of Speech: "[w]hether Plaintiff committed the

crime of disorderly conduct or was exercising his right to Free Speech is a fact question in dispute." (CR 228)

The district court granted summary judgment to CompUSA [App. 7] and Johnson. [App. 8] Judgment became final on April 9, 1998. Represented by the same counsel, Larkin filed a timely motion for a new trial, raising the exact same Fighting Words Doctrine argument. Larkin also made clear that the Texas courts have ruled that "*Tex. Penal Code Ann.* § 42.01(a)(1) . . . applies only to 'fighting words' which by their very utterance tend to incite an immediate breach of the peace. *Jimmerson v. State*, 561 S.W.2d 5, 7 (Tex. Crim. App. 1978)." (CR 262-63) The district court denied Larkin's motion for a new trial on June 15, 1998. [App. 14]

Represented by the same counsel as at trial court, Larkin filed an appeal to the 14th Texas Court of Appeals. Larkin was allowed to file this appeal out-of-time. Larkin raised word-for-word the same Fighting Words Doctrine argument as he did at trial court in his response to Respondents' motions for summary judgment. On March 22, 2001 the court of appeals denied Larkin's appeal, affirming judgment of the trial court, [App. 6] and issued its opinion. [App. 1-5] The court of appeals acknowledged that Larkin had made a Freedom of Speech claim – "Larkin contends summary judgment was unwarranted because Johnson maliciously arrested him for what Larkin said as he left the CompUSA store where the deputy worked an off-duty job." [App. 1] – but the court of appeals did not otherwise address it.

Acting on his own behalf, Larkin filed a timely motion for rehearing with the court of appeals, and

argued that the court did not properly apply the analysis of this Court's ruling in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) or *Gooding v. Wilson*, 405 U.S. 518 (1972).

> The court did not properly measure [Larkin's] conduct against the accepted standard objective reasonableness of landmark U.S. Supreme Court cases *Chaplinsky v. New Hampshire*, 315 U.S. 568, and *Gooding* [*v. Wilson*, 405 U.S. 518 (1972)], and Texas Attorney General Opinion No. JM-900. [App. 15-18] Against these accepted objective standards of what conduct constitutes disorderly conduct under Penal Code 42.01(a)(1), saying "What the hell are you doing?" in a slightly louder than conversational tone of voice doesn't even register a blip on the meter. (Larkin's Motion for Rehearing, pg. 6)

The court of appeals overruled Larkin's motion for rehearing on April 26, 2001. [App. 9] Acting on his own behalf, Larkin filed a timely Petition for Review with the Supreme Court of Texas, arguing that the lower courts misapplied this Court's ruling in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) and *Gooding v. Wilson*, 405 U.S. 518 (1972).

> To support his argument that "What the hell are you doing?" is not language which violates *Disorderly Conduct*, Larkin uses the objective legal reasonableness of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), *Gooding v. Wilson*, 405 U.S. 518 (1972) and *Texas Attorney General Opinion JM-900*. [See App. 15-18]. (Larkin's Petition for Review, pg. 3)

and,

> Texas courts have uniformly held that TPC [*Tex. Penal Code Ann.*,] § 42.01(a)(1) applies to "fighting words", words that "by their very utterance tend to incite an immediate breach of the peace." *Duran v. Furr's Supermarkets, Inc.*, 921 S.W.2d 778, 785 (Tex. App. – El Paso 1996, writ denied) citing *Chaplinksy v. New Hampshire*, 315 U.S. 568. The concept of "breach of the peace" includes actual or threatened violence as an essential element, *Woods v. State*, 152 Tex. Crim. 338, 213 S.W.2d 685, 687 (Tex. Crim. App. 1948). Speech that is merely harsh and insulting is not punishable. *Gooding v. Wilson*, 405 U.S. 518, 525 (1972). (Larkin's Petition for Review, pg. 7)

The Supreme Court of Texas denied Larkin's Petition for Review on August 9, 2001. [App. 10-11] Acting on his own behalf, Larkin filed a timely motion for rehearing. The Supreme Court of Texas denied Larkin's motion for rehearing on September 27, 2001. [App. 12-13]

SUMMARY OF ARGUMENT

Instead of applying the analysis mandated by this Court's precedents on fighting words, the Texas court of appeals ignored them. The opinion of the Texas court of appeals did not address the Fighting Words Doctrine whatsoever. By affirming summary judgment the Texas court of appeals held, by default, that Johnson had probable cause to arrest Larkin, reasonable suspicion to detain him, and, because Johnson offered no other objective justification for Larkin's detention, that "What the hell are you doing?" is criminal activity, specifically fighting words.

This case turns on whether "What the hell are you doing?" are fighting words. It is the central, supporting and cohesive element of this whole case. For if "What the hell are you doing?" are not fighting words, then the subsequent conclusions of law and judgments of law topple one after the other. Specifically, "What the hell are you doing?" are not fighting words; so there's no reasonable suspicion to detain Larkin for disorderly conduct; so there's no probable cause to arrest Larkin for evading detention; so Johnson didn't act in good faith when he arrested Larkin; so Johnson wasn't entitled to qualified official immunity; and finally the Texas trial court was in error to grant Johnson, and consequently CompUSA, summary judgment from Larkin's suit for damages. Larkin's Constitutional right to equal protection of the laws was violated, and in turn he was deprived of his day in court.

ARGUMENT

This is an appeal from summary judgment. In reviewing summary judgment the Texas courts must take all evidence favorable to the non-movant (Larkin) as true, resolving all doubts and indulging all reasonable inferences in the non-movant's favor. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). More importantly, the Texas court of appeals doesn't address the elements of Larkin's arrest. There's no analysis of fighting words, disorderly conduct, or evading detention, even though Larkin raised each of those issues at every level with the Texas courts. In fact, its opinion doesn't even mention the crime for which Larkin was arrested:

"As Larkin started to get in his car, Johnson arrested him." Larkin's sole issue on appeal before the 14th Texas Court of Appeals was that "the trial court erred in granting summary judgment for both defendants". The Supreme Court of Texas has ruled that such language preserves all possible grounds upon which summary judgment should have been denied. *See Plexchem International, Inc. v. Harris County Appraisal District*, 922 S.W.2d 930, 930-31 (Tex. 1996).

It appears that the justification by the Texas court of appeals for its silence on the issues of fighting words, disorderly conduct, and evading detention is provided by the second to last sentence of its opinion: "[The doctrine of qualified governmental immunity] renders facts relating only to the substantive causes of action immaterial." But one of the tests on qualified governmental immunity is objective legal reasonableness. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 657 (Tex. 1994) (quoting *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993), regarding the standard of review for objective legal reasonableness: the plaintiff must produce evidence that "no reasonable person in the defendant's position could have thought the facts were such that they justified the defendant's acts.")

The Texas court of appeals' refusal to reveal its reasoning confuses and frustrates Larkin much the way the Cheshire Cat did Alice when she asked for directions in Wonderland.

> "In THAT direction," the Cat said, waving its right paw around, "lives a Hatter: and in THAT direction," waving the other paw, "lives a

March Hare. Visit either you like: they're both mad."

"But I don't want to go among mad people," Alice remarked.

"Oh you can't help that," said the Cat: "we're all mad here. I'm mad. You're mad."

"How do you know that I'm mad?" said Alice.

"You must be," said the Cat, "or you wouldn't have come here."

Alice didn't think that proved it at all . . . .

(L. Carroll, Alice's Adventures in Wonderland, p. 104, Candlewick Press, 1999).

Exactly, that didn't prove it at all, for the question Larkin presents to this Court is one of First Amendment Freedom of Speech, applicable to the State of Texas by the Fourteenth Amendment. This case involves conclusions of law that are implicitly inseparable from the findings of fact. Thus, the U.S. Supreme Court must "independently review the factual record to ensure that the state court's judgment does not unlawfully intrude on free expression. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 at 567-568 (1995)." *BSA v. Dale*, 530 U.S. 640, 648 (2000). The U.S. Supreme Court must assure itself that the judgment of the Texas court of appeals "does not constitute a forbidden intrusion on the field of free expression." *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964).

1. "What the hell are you doing?" are not fighting words.

"There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include . . . 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace . . . . 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' *Cantwell v. Connecticut,* 310 U.S. 296, 309-310." *Chaplinisky v. New Hampshire,* 315 U.S. 568, 571-72 (1942).

Fighting words are " 'what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . Derisive and annoying words can be taken as coming within the purview of the statute . . . only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. . . . . ' *91 N. H. 310, 313, 320-321, 18 A. 2d 754, 758, 762 (1941).*" *Gooding v. Wilson,* 405 U.S. 518, 523 (1972).

" 'The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee. . . . ' " *Id.*

Proscribed speech must be "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Cohen v. California, 403 U.S. 15, 20.* Additionally, the offensive words must be

"directed to the person of the hearer." *Id.*, quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940).

In sum, to be fighting words the expression spoken must (1) constitute a personally abusive epithet (2) addressed in a face-to-face manner (3) directly to the person of the hearer and, (4) as a matter of common knowledge, be inherently likely to provoke an immediate violent response by an average addressee. If any of these elements is missing, then the Fighting Words Doctrine doesn't apply for the purpose of punishing that expression.

Because this case also involves speech directed to a police officer, *Hill v. City of Houston*, 482 U.S. 451, 462 (1987), is especially important:

> "Moreover, in a concurring opinion in *Lewis [v. City of New Orleans*, 415 U.S. 130 (1974)], JUSTICE POWELL suggested that even the "fighting words" exception recognized in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), might require a narrower application in cases involving words addressed to a police officer, because "a properly trained officer may reasonably be expected to 'exercise a higher degree of restraint' than the average citizen, and thus be less likely to respond belligerently to 'fighting words.' " 415 U.S. at 135."

Regarding the facts of this case, Larkin did speak directly to Johnson in a face-to-face manner, but those are the only elements of fighting words that Larkin's "what the hell are you doing?" utterance met. "What the hell are you doing?" does not constitute a personally abusive epithet, nor is it language that is inherently likely to

cause an immediate violent response, particularly from a properly trained police officer. Larkin asked one single question to Johnson, acknowledged Johnson's answer, then walked away. Larkin was not hurling abuse at Johnson in a persistent manner. The Supreme Court of Pennsylvania held in *Pennsylvania v. Hock*, 556 Pa. 409, 416 (Pa. 1999), that a single profane remark (specifically, "F you, a .") spoken in a normal tone of voice directed to a police officer does not constitute fighting words.

In many ways *Pennsylvania v. Hock*, 556 Pa. 409 (Pa. 1999) is similar to this case. Ms. Hock was questioned by a police officer on suspicion of a traffic violation. She made her profane remark as she walked away from the officer. The officer pursued Ms. Hock and advised her that she was under arrest for disorderly conduct. The disorderly conduct statute in Pennsylvania is also based on the Fighting Words Doctrine. As the officer placed handcuffs on Ms. Hock, she shouted protestations and then kicked the officer several times. Hock was charged with disorderly conduct and resisting arrest. The Supreme Court of Pennsylvania held that Ms. Hock's remark didn't constitute fighting words, therefore the officer didn't have probable cause to arrest her. Also, since Ms. Hock wasn't lawfully under arrest, she couldn't have committed the offense of resisting arrest.

Especially compelling is the Supreme Court of Pennsylvania's caution against police abuse of the disorderly conduct statute:

> "Moreover, the offense of disorderly conduct is not intended as a catchall for every act which annoys or disturbs people; it is not to be used as a dragnet for all the irritations which breed in

> the ferment of a community. It has a specific purpose; it has a definite objective, it is intended to preserve the public peace; it has thus a limited periphery beyond which the prosecuting authorities have no right to transgress any more than the alleged criminal has the right to operate within its clearly outlined circumference." *Pennsylvania v. Hock*, 556 Pa. 409, 418 (Pa. 1999).

In deciding whether words are fighting words, "the circumstances surrounding the words can be crucial, for only against the background of surrounding events can a judgment be made whether [the] words had 'a direct tendency to cause acts of violence' by [the addressee]." *Lamar v. Banks*, 684 F.2d 714, 719 (11th Cir. 1982). Also, *see Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1974) (Powell, J., concurring) (observing that "words may or may not be 'fighting words' depending upon the circumstances of their utterance").

Johnson had just forcibly marked on and tried to take Larkin's receipt. Larkin had the right to protect his property under *Tex. Penal Code Ann.* § 9.41(a): "A person in lawful possession of . . . tangible, movable property is justified in using force against another to the degree the actor reasonably believes that the force is immediately necessary to . . . terminate the other's . . . unlawful interference with the property." Larkin was also protected from Johnson marking on his receipt without consent. *Tex. Penal Code Ann.* § 28.03(a)(3) provides that "a person commits an offense if, without the effective consent of the owner, he intentionally or knowingly makes markings . . . on the tangible property of the owner." Additionally, the Texas court of appeals appears to say that Larkin was in the wrong for not freely releasing his

receipt: "Johnson was marking receipts at CompUSA as a security guard when Larkin, a customer leaving with merchandise, resisted releasing his receipt." [App. 1-2]

Possibly some find the word "hell" offensive. However, as Larkin used it, the American Heritage Dictionary of the English Language, Third Edition, 1992 defines "hell" as "*Informal*, Used as an intensive". This is word-for-word synonymous with such innocent words and terms as "devil", "deuce", "dickens" and "in the world". Not even the most grammatically squeamish would find "What in the world are you doing?" personally abusive, by its very utterance likely to cause an immediate violent response. Synonymously, only the supersensitive would find "What the hell are you doing?" personally abusive, likely to cause an immediate violent response by the average addressee. "What the hell are you doing?" spoken in the circumstances in which Larkin uttered it, are not fighting words.

2. Respondent Deputy Johnson did not have reasonable suspicion under the Fourth Amendment to detain Petitioner Larkin for disorderly conduct.

There are two ways to examine this issue. Either the issue is moot because the proper standard of review is whether Johnson had probable cause to arrest Larkin without a warrant, or, if reasonable suspicion is the proper standard of review, then whether Johnson had sufficient objective reasonableness for an investigative stop on suspicion of disorderly conduct.

One, Johnson testified in deposition (CR 177) and on affidavit (CR 153) that he attempted an investigative stop

of Larkin for the offense of disorderly conduct. But, Johnson knew all of the facts prior to the stop; further investigation would reveal nothing. Either Larkin had committed disorderly conduct beforehand, or he had not. Therefore, the issue is whether Johnson had probable cause to arrest Larkin without a warrant, not whether Johnson had reasonable suspicion to attempt an investigative stop. *See Texas v. Rivenburgh*, 933 S.W.2d 698, 700-701 (Tex. App. San Antonio 1996, no pet.) (citing *Whren v. United States*, 517 U.S. 806, 816-19 (1996) ("issue where stop followed observed traffic violation was whether probable cause existed").)

Two, to justify an investigative stop an officer must have specific articulable facts, taken in light of his or her experience and general knowledge together with rational inferences from those facts, that would reasonably warrant the intrusion. *See Terry v. Ohio*, 392 U.S. 1, 21-22 (1968). "The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. *Terry v. Ohio*, 392 U.S., at 32-33 (Harlan, J., concurring); *id.*, at 34 (WHITE, J., concurring). He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds." *Florida v. Royer*, 460 U.S. 491, 497-498 (1983). Ultimately, to justify any detention there must be reasonable suspicion that criminal activity is afoot. *See Brown v. Texas*, 443 U.S. 47, 51 (1979).

The offense of disorderly conduct under *Tex. Penal Code Ann.* § 42.01(a)(1) is committed when a person intentionally or knowingly uses abusive, indecent, profane, or

vulgar language in a public place, and the language by its very utterance tends to incite an immediate breach of the peace. The Texas courts have ruled that *Tex. Penal Code Ann.* § 42.01(a)(1) applies only to "fighting words" which by their very utterance tend to incite an immediate breach of the peace as required by *Chaplinsky v. New Hampshire*, 315 U.S. 568, 86 L. Ed. 1031, 62 S. Ct. 766 (1942). *Ross v. State*, 802 S.W.2d 308, 314-15 (Tex.App. – Dallas 1990, no pet.) (Section 42.01(a)(1) applies only to "fighting words" and is not unconstitutionally vague). *See Duran v. Furr's Supermarkets, Inc.*, 921 S.W.2d 778, 785 (Tex. App. – El Paso 1996, writ denied). This was also Texas's legislative intent: "The 'practice commentary' in the annotated Code confirms that this section is designed to track the 'fighting words' exception set forth in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). *Tex. Penal Code Ann.* § 42.01, pp. 124-125 (1974 and Supp. 1987)." *Hill v. Houston*, 482 U.S. 451, 463 (Fn. 10) (1987).

Even though this is an appeal from summary judgment and the courts are required to view the evidence in a light favorable to Larkin, there is no substantive dispute on the record as to what happened immediately after Johnson marked on and tried to take Larkin's receipt. Larkin testified in deposition that he "pulled the receipt back, and asked [Johnson] 'What the hell are you doing?' " (CR 199) Johnson swore in his affidavit that Larkin "grabbed the receipt from my hand and stated 'What the hell are you doing, that's my receipt!' " (CR 152) Larkin and Johnson also agree that Johnson immediately explained why he was checking the receipt, and afterwards that Larkin walked away toward the exit. (CR 200 and CR 152, 171, respectively)

Johnson swore in his affidavit that he decided to detain Larkin for disorderly conduct under *Tex. Penal Code Ann.* § 42.01(a)(1). (CR 153) His justification to detain Larkin was because (1) Larkin's "actions were highly unusual", (2) Larkin's "actions toward me caused me to be alarmed and concerned as to his immediate, past or future actions", (3) and Johnson "needed to maintain control over the situation in order to protect the safety of the individuals in the area". (CR 152-154) First, *Tex. Penal Code Ann.* § 42.01(a)(1) only applies to speech. It doesn't apply to physical conduct. Johnson's use of the word "action" applies only to Larkin having said, "What the hell are you doing?" Second, with nothing more, highly unusual speech is not an element of disorderly conduct. Third, there is a crisp and bright distinction between speech causing alarm and speech having a direct tendency to cause immediate violent response. More importantly, there's evidence that Johnson wasn't alarmed. Larkin gave deposition testimony that Johnson's response to "What the hell are you doing?" was polite and reasonable. (CR 200) Fourth, Johnson was being disingenuous by implying that there was a breach of the peace at the time. He gave deposition testimony that he did not see Larkin's behavior incite anyone to breaching the peace. (CR 177) Thus, Johnson provided no specific articulable facts to support reasonable, objective grounds to detain Larkin for suspicion of disorderly conduct. Thus, Johnson did not have reasonable suspicion to detain Larkin for disorderly conduct.

Additionally, the opinion by the Texas court of appeals appears to allow police officers their own discretion to decide what speech constitutes fighting words.

The opinion states that "Johnson followed [Larkin] outside, and attempted an investigative stop for suspicion of disturbing the peace." But disturbing the peace is not defined as an offense in Texas, nor is it an element of an offense. Disturbing the peace was a statute in Texas – Title 9, Chapter 3, Article 474 – but it was amended and renamed disorderly conduct by Texas Act of June 10, 1969, 61st Leg., p. 1510, ch. 454, § 1, eff. June 10, 1969. Then it was repealed by Texas Acts of 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. January 1, 1974. Because disturbing the peace is not an offense, it can not be lawful justification to detain someone. *Brown v. Texas*, 443 U.S. 47, 51 (1979), (Police officers must "have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.") Not only does the opinion by the Texas court of appeals give the police authority to detain persons for non-criminal activity (that is, disturbing the peace), it leaves the definition of disturbing the peace up to individual officers' personal and subjective initiative.

3. Respondent Deputy Johnson did not have probable cause under the Fourth Amendment to arrest Petitioner Larkin for disorderly conduct or evading detention.

As shown in section 2 above, Johnson didn't have reasonable suspicion to detain Larkin for disorderly conduct. Also, reasonable suspicion is a less demanding standard than probable cause. *See Alabama v. White*, 496 U.S. 325, 330 (1990). Therefore, since Johnson didn't have the lower standard of reasonable suspicion to detain Larkin for disorderly conduct, Johnson can't have higher standard of probable cause.

Evading detention under *Tex. Penal Code Ann.*, § 38.04(a) is committed when a person intentionally flees from a person he or she knows is a peace officer attempting lawfully to arrest or detain him or her. Thus, a valid charge for evading detention requires underlying lawful detention, which in turn requires that the arresting officer have reasonable suspicion that criminal activity is afoot. *See Brown v. Texas*, 443 U.S. 47, 51 (1979). In this case Johnson's reasonable suspicion to detain Larkin was predicated upon disorderly conduct under *Tex. Penal Code Ann.*, § 42.01(a)(1), which the Texas courts have ruled only applies to fighting words. *Ross v. State*, 802 S.W.2d 308, 314-15 (Tex.App. – Dallas 1990, no pet.) (Section 42.01(a)(1) applies only to "fighting words" and is not unconstitutionally vague); *See Duran v. Furr's Supermarkets, Inc.*, 921 S.W.2d 778, 785 (Tex. App. – El Paso 1996, writ denied).

A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view. Tex. Code Crim. Proc. Ann. art. 14.01(b). Probable cause which will justify an arrest without a warrant by police officers exists where the facts and the circumstances within the officers' knowledge and of which they have reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Dunaway v. New York*, 442 U.S. 200, 208 (1979).

"What the hell are you doing?" are not fighting words, as shown in section 1, and disorderly conduct under *Tex. Penal Code Ann.*, § 42.01(a)(1) only applies to fighting words, *Ross v. State*, 802 S.W.2d 308, 314-15 (Tex.App. – Dallas 1990, no pet.), thus "What the hell are

you doing?" is not speech that constitutes the offense of disorderly conduct. Johnson provided no more objective reasonableness to detain Larkin for suspicion of disorderly conduct than Larkin having said "What the hell are you doing?", thus Johnson did not have the lawful authority to detain Larkin for suspicion of disorderly conduct. *Florida v. Royer*, 460 U.S. 491, 498 (1983) (an individual "may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.") Since Johnson did not have the lawful authority to detain Larkin, a predicate element of evading detention, the circumstances within Johnson's knowledge were not sufficient to warrant a prudent officer to believe that Larkin had committed the offense of evading detention. Thus, Johnson did not have probable cause to arrest Larkin for evading detention.

4. Respondent Deputy Johnson was not entitled to Qualified Official Immunity.

Under Texas law, a defendant seeking a summary judgment on an affirmative defense of immunity must prove, without dispute and as a matter of law, that when the event in question occurred, he or she was: (1) performing a discretionary function, (2) acting in good faith, and (3) acting within the scope of their authority. *See City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). This is correctly stated and cited of the opinion of the Texas court of appeals. [App. 4]

Also, when a trial court's order does not specify the grounds relied on for its ruling, as in this case, the

summary judgment will be affirmed if any of the theories advanced are meritorious. *Insurance Co. of North America v. Security Ins. Co.*, 790 S.W.2d 407, 410 (Tex. App. – Houston [1st Dist.] 1990, no writ). However, this distinction is moot here. Johnson and CompUSA each specified only one ground for summary judgment. Johnson's claim was for qualified official immunity. CompUSA's claim was that once Johnson witnessed Larkin commit a crime, it was no longer liable for Johnson's actions.

The Texas court of appeals correctly held that Johnson's arrest of Larkin was undisputedly discretionary. [App. 4] Whether Johnson acted within the scope of his authority is now moot. It does not comprise a subsidiary question fairly included within this petition's Question Raised. However, whether Johnson acted in good faith when he arrested Larkin for "using foul and abusive language with a peace officer and for evading detention" does go to whether the Texas courts misapplied the Fighting Words Doctrine.

Citing *City of Lancaster v. Chambers*, 883 S.W.2d 650, 656 (Tex.1994), the Texas court of appeals correctly held that a court must measure good faith in official immunity cases against a standard of objective legal reasonableness, regardless of the officer's subjective state of mind. Then the Texas court of appeals incorrectly stated that "the evidence clearly supports the officer's objective legal reasonableness, and the appellant has not controverted it with probative evidence that 'no reasonable person in the defendant's position could have thought that the facts were such that they justified the defendant's acts.' *Chambers*, 883 S.W.2d at 657." No reasonable police officer in Johnson's position is going to think that the facts were

such that they justified Johnson in making an arrest absent probable cause. No reasonable police officer is going to feel justified in arresting someone for disorderly conduct when he or she says, "What the hell are you doing?" This is especially true after provoking the person by trying to take something out of his or her hands without consent.

Included with his motion for summary judgment Johnson presented three expert witness affidavits. One was his own. The others were from Mike Faas, a Harris County Sheriff's Department instructor (CR 146-48), and Scott Durfee, an Assistant Harris County District Attorney. (CR 142-44) All three concluded that Larkin had committed the offenses of disorderly conduct and evading detention. "An expert's testimony will support summary judgment only if it is 'clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted' Tex. R. Civ. P. 166a(c)." *Wadewitz v. Montgomery*, 951 S.W.2d 464, 466 (Tex. 1997). However, instead of presenting credible testimony, all three ignored contradictory evidence and other damaging proof. For example, each incorrectly stated that Larkin was verbally abusive, that his tone of voice was disruptive, and that this created a disturbance. Larkin gave evidence that his tone of voice was "not loud", (CR 214) and Johnson gave evidence that no one in the vicinity was incited to breaching the peace. (CR 177) Thus, all three expert witnesses failed to establish that Johnson acted in good faith when he arrested Larkin because not one of them complied with Tex. R. Civ. P. 166a(c).

More importantly, Mike Faas used evidence that is not on the record. Faas overwhelmingly based his expert witness testimony on the unsubstantiated idea that Larkin had said, "What the hell are you doing, motherfucker?" Similarly, the Texas court of appeals incorrectly states the same idea: "The parties dispute whether Larkin actually did refer to the officer as 'motherfucker'." [App. 2] On the record, however, there is no dispute; Larkin and Johnson agree. Larkin gave deposition testimony that he said, "What the hell are you doing?" (CR 200) Johnson swore under oath on his affidavit that Larkin said, "What the Hell are you doing, that is my receipt!"(CR 152) Johnson swore in his deposition that he could not recall what Larkin said. (CR 167) Johnson based his deposition memory of the incident solely upon reading a copy of his original offense report.[3] (CR 167) However, the offense report itself was not entered into summary judgment evidence. It was only in their unsubstantiated pleadings that Johnson and CompUSA allege that Larkin said, "What the hell are you doing, motherfucker?" (CR 14-15 and CR 156 fn. 1, respectively) Larkin did state in his original pleading that "Johnson . . . accused Plaintiff of saying the word 'motherfucker' ", (CR 3-4) but Larkin admitted no such fact, just that it was Johnson's accusation.

Additionally, lawsuits in Texas alleging false imprisonment, as does this, specifically turn on whether

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[3] The offense report had been expunged and turned over to Larkin. (CR 166-67) During Johnson's deposition Larkin presented the offense report so that Johnson could refresh his memory.

the associated detention was lawful. *See Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995). As shown in section 3 above, Johnson did not have probable cause to arrest Larkin. Johnson's detention of Larkin was unlawful.

In sum, Johnson did not have objective legal reasonableness to demonstrate that he arrested Larkin in good faith, and Johnson's subjective state of mind must be disregarded. Thus, Johnson is not entitled to qualified official immunity.

5. Summary Judgment was granted Respondent Deputy Johnson and Respondent CompUSA in error.

In Texas a movant for summary judgment must show that there are no genuine issues of material fact and that he is entitled to judgment as a matter of law. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548 (Tex. 1985). In determining whether there is a disputed fact issue precluding summary judgment, the proof must be viewed in a light most favorable to the non-movant (Larkin), resolving all doubts and indulging all reasonable inferences in the non-movant's favor. *Id.* at 548-49.

As shown in section 4, Johnson is not entitled to qualified official immunity from his arrest of Larkin. Whether Johnson acted in good faith when he arrested Larkin is a material fact issue still in dispute. Thus, Johnson is not entitled to summary judgment as a matter of law. The Texas court of appeals was in error to have affirmed the trial court's grant of summary judgment to Respondent Johnson.

CompUSA's motion for summary judgment was based on one claim, essentially expressed in two sentences:

> "The summary judgment record establishes that, when Deputy Johnson observed Mr. Larkin disturbing the peace and evading detention, Deputy Johnson became an on-duty policy (sic) officer and, therefore, not an employee of CompUSA as a matter of law. Plaintiff's sole claim against CompUSA, based on vicarious liability for the acts of Deputy Johnson, therefore fails. *See Leake [v. Half Price Books, Records, Magazines, Inc.]*, 918 S.W.2d at 561-64." (CR 158).

The problem with CompUSA's theory is that its premise is faulty. Larkin didn't commit a crime. Furthermore, at no time did Johnson have the lawful authority to detain Larkin for suspicion of any criminal activity. Thus, there is a material fact issue dispute as to whether Johnson ever assumed his duty as a Texas peace officer, or was instead and at all relevant times an employee of CompUSA. It is, therefore, CompUSA's sole claim for summary judgment that fails.

CONCLUSION

The Texas courts misapplied the analysis mandated by this Court's remarkably consistent precedents on fighting words, and a cascade of erroneous conclusions of law and judgments of law resulted. Ultimately, the Texas courts erred by holding that Johnson and CompUSA were entitled to summary judgment as a matter of law, thereby

violating Larkin's U.S. Constitutional right to equal protection of the laws and depriving him of his day in court. This Court should grant Larkin's petition.

Respectively submitted,

WARD LARKIN
Pro Se Petitioner

15327 Pebble Bend Drive
Houston, TX 77068-1839
Tel.: 281-444-3840
Fax: 281-895-9939

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Affirmed and Opinion filed March 22, 2001.

In The

Fourteenth Court of Appeals of Texas

No. 14-98-00789-CV

Ward S. Larkin, Appellant

v.

Michael Johnson and CompUSA, Inc., Appellee

On Appeal from the 133rd District Court
Harris County, Texas
Trial Court Cause No. 97-30752

OPINION

Harris County Deputy Sheriff Michael Johnson demonstrated with summary judgment proof that qualified official immunity protected him when he arrested the Appellant, Ward S. Larkin, in the parking lot outside a CompUSA. The trial court granted summary judgment. Larkin contends summary judgment was unwarranted because Johnson maliciously arrested him for what Larkin said as he left the CompUSA store where the deputy worked an off-duty job. We find Johnson proved as a matter of law that he acted as a Harris County Deputy Sheriff rather than as an employee of CompUSA. As there is no issue of material fact regarding any element of qualified official immunity, we affirm.

Johnson was marking receipts at CompUSA as a security guard when Larkin, a customer leaving with

merchandise, resisted releasing his receipt. Larkin undisputedly stated, "What the hell are you doing?" The parties dispute whether Larkin actually did refer to the officer as "motherfucker" during this incident. We will assume he did not. Johnson considered Larkin's question as loud. Johnson followed him outside, and attempted an investigative stop for suspicion of disturbing the peace. Johnson clearly identified himself to Larkin as a Harris County Sheriff's Deputy, and ordered him to stop. Larkin refused, stating that if Johnson wanted him to stop, he would have to arrest him. As Larkin started to get in his car, Johnson arrested him.

Larkin argues that Johnson's malice, an element of at least one of the causes of action, arose when Johnson was engaged in the protection of the employer's property. *See Blackwell v. Harris County*, 909 S.W.2d 135, 139 (Tex. App. – Houston [14th Dist.] 1995, writ denied) (quoting *Glenmar Cinestate, Inc. v. Farrell*, 223 Va. 728, 292 S.E.2d 366, 369-70 (1982)). Accordingly, Larkin contends it is a jury question whether Johnson committed the torts as a public officer or as a servant of the employer. However, the comparison of the objective action and actual duty involved, not scienter, determines the immunity question. Notably, *Blackwell* explains that where an officer is performing a job incident to enforcing the public laws, he is acting in the course and scope of his employment as a police officer even if the private employer directed him to perform the duty.

It is undisputed Johnson marked the receipt to protect CompUSA's property while inside the store. However, this duty was complete when Larkin left the store. There is also no contention that, Johnson enforced any

CompUSA policy or advanced CompUSA's interests[1] when he went outside and arrested a paying customer. Thus, there is no issue of material fact about whether Johnson was acting as an employee of the Harris County Sheriff's Office when he arrested a person who refused to comply with the officer's attempt to detain him. *See generally Bridges v. Robinson*, 20 S.W.3d 104, 114 (Tex. App. – Houston [14th Dist.] 2000, no pet. h.) (Finding officers riding hogtied citizen and otherwise abusing him until he died raised a "fact issue" about whether officers working as guards at Dillards were acting in their capacity as peace officers); *Blackwell v. Harris County*, 909 S.W.2d at 139; *City of Dallas v. Half Price Books, Records, Magazines, Inc.*, 883 S.W.2d 374 (Tex. App. – Dallas 1994, no writ) (explaining peace officer becomes a government agent when he begins to function as one). Johnson was acting as an officer, not as an employee of CompUSA when he

---

[1] Larkin attempts to assert fact issues about subjective malice in the context of his underlying false arrest and wrongful prosecution claims. He argues the officer's subjective reasons for behavior presents a jury issue on whether Johnson arrested him out of subjective malice. To the extent Larkin is also arguing anger arising from Johnson's functions for CompUSA prevented Johnson from making the arrest as an officer, we disagree. If Clark Kent is outraged about wrongdoing he discovers while on assignment, his anger is not kryptonite. He is nonetheless Superman as he sallies forth to fight for truth, justice, and the American way. A hero without feeling would be inhuman, not superhuman. From the affidavits of Johnson's superiors, Johnson functioned in all ways as we would expect of a Texas peace officer – even if Larkins' eye could not follow the blinding speed with which Johnson's capacity changed as he passed the door.

arrested the appellant. Accordingly, CompUSA is not liable for Johnson's actions in making the arrest.

Government employees are entitled to official immunity from suit arising from the performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). The arrest was undisputedly discretionary. The Texas Supreme Court observed in *Chambers* that a court must measure good faith in official immunity cases against a standard of objective legal reasonableness, regardless of the officer's subjective state of mind. 883 S.W.2d at 656. The evidence clearly supports the officer's objective legal reasonableness, and the appellant has not controverted it with probative evidence that "no reasonable person in the defendant's position could have thought that the facts were such that they justified the defendant's acts." *Chambers*, 883 S.W.2d at 657. It is undisputed that the claims arose from Johnson making an arrest and turning the case over to the District Attorney's office. These functions are within the scope of a deputy sheriff's authority. Thus, we do not reach Larkin's causes of action because we conclude Johnson objectively functioned within the aura of the qualified governmental immunity doctrine. This doctrine renders facts relating only to the substantive causes of action immaterial. Accordingly, we affirm.

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed March 22, 2001.

Panel consists of Justices Sears, Lee, and Amidei.*

Publish – TEX. R. APP. P. 47.3(b).

---

* Senior Justices Ross A. Sears, Norman Lee, and Former Justices Maurice Amidei sitting by assignment.

March 22, 2001

Judgment

The Fourteenth Court of Appeals of Texas

No. 14-98-00789-CV

Ward S. Larkin, Appellant

v.

Michael Johnson and CompUSA, Inc., Appellee

This cause, an appeal from judgment in favor of appellee, Michael Johnson and CompUSA, Inc., signed April 9, 1998, was heard on the transcript of the record. We have inspected the record and find no error in the judgment. We order the judgment of the court below AFFIRMED.

We order appellant, Ward S. Larkin, to pay all costs incurred in this appeal. We order this decision certified below for observance.

CAUSE NO. 97-30752

WARD S. LARKIN,	§	IN THE DISTRICT
Plaintiff	§	COURT OF
	§	
VS.	§	
	§	HARRIS COUNTY, TEXAS
COMPUSA, INC. and MICHAEL JOHNSON,	§	
	§	
Defendants.	§	133rd JUDICIAL DISTRICT

ORDER

On the 2nd day of March, 1998, came on to be heard the Motion for Summary Judgment of CompUSA, Inc. and the Court, having considered the Motion, any responses thereto, the evidence before it and the pleadings and discovery on file, is of the opinion that this Motion for Summary Judgment is meritorious and should be GRANTED. It is therefore

ORDERED that Plaintiff, Ward S. Larkin, take nothing on his claims against CompUSA, Inc. Costs of court are taxed against Plaintiff.

SIGNED this 25 day of March, 1998.

/s/ Lamar McCorkle
JUDGE PRESIDING

[97-30752]
NO. ~~672,533~~

WARD LARKIN,	§	IN THE DISTRICT COURT OF
VS.	§	HARRIS COUNTY, TEXAS
MIKE JOHNSON	§	133RD JUDICIAL DISTRICT

ORDER

On ~~this day~~ [March 2, 1998], came on to be heard Defendant, Michael Johnson's Motion for Summary Judgment, and after considering same, it is the opinion of this Honorable Court that said Motion should in all things be **GRANTED** [on March 6, 1998].

SIGNED on this the 9 day of April, 1998.

/s/ Lamar McCorkle
JUDGE PRESIDING

APPROVED AS TO FORM:

MICHAEL P. FLEMING,
99999939
County Attorney

/s/ Christopher L. Janak
CHRISTOPHER L. JANAK
Assistant County Attorney
1001 Preston, Suite 634
Houston, Texas 77002
(713) 755-4985
(713) 755-8924 Fax

RECORDER'S MEMORANDUM
This instrument is of poor quality and not satisfactory for photographic recordation, and/or alterations were present at the time of filming.

FOURTEENTH COURT OF APPEALS
[Seal of Texas] 1307 San Jacinto, 11th Floor
Houston, TX 77002

April 26, 2001

RE: Case No. 14-98-00789-CV

[USPS Meter Mark
Houston, APR 26'01]

Style: Larkin, Ward S.
v. Comp USA Inc and Johnson Michael

Please be advised that, on this date, the Court OVERRULED appellant's(s') motion for rehearing in the above cause.

T.C. Case # 97-30752 Ed Wells, Clerk

Ward S. Larkin
15327 Pebble Bend Drive
Houston, TX 77068-1839

[SEAL] **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

August 9, 2001

Ms. Leslie Ashby (Garcia)
Ashby & Whitmire
1415 Louisiana, Suite 3200
Houston, TX 77002

Mr. Ryan Chadwick
Jackson & Walker
1100 Louisiana, Suite 4200
Houston, TX 77002

Mr. Michael R. Hull
Harris County Attorney's Office
1019 Congress, 15th Floor
Houston, TX 77002

RE: Case Number 01-0501
Court of Appeals Number: 14-98-00789-CV
Trial Court Number: 97-30752

Style: WARD S. LARKIN
v.
COMPUSA, INC. and MICHAEL JOHNSON

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,

John T. Adams, Clerk

by /s/ Tanya Hunter
Tanya R. Hunter,
Deputy Clerk

cc: Mr. Ed Wells, Clerk
Mr. Charles Bacarisse
Mr. Ward Larkin

[SEAL] **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

September 27, 2001

Ms. Leslie Ashby (Garcia)
Ashby & Whitmire
1415 Louisiana, Suite 3200
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Mr. Ryan Chadwick
Jackson & Walker
1100 Louisiana, Suite 4200
Houston, TX 77002

Mr. Michael R. Hull
Harris County Attorney's Office
1019 Congress, 15th Floor
Houston, TX 77002

RE: Case Number 01-0501
Court of Appeals Number: 14-98-00789-CV
Trial Court Number: 97-30752

Style: WARD S. LARKIN
v.
COMPUSA, INC. and MICHAEL JOHNSON

Dear Counsel:

Today, the Supreme Court of Texas denied the motion for rehearing of the above-styled petition for review.

Sincerely,

John T. Adams, Clerk

by /s/ Tanya Hunter
Tanya R. Hunter,
Deputy Clerk

cc: Mr. Ed Wells, Clerk
Mr. Charles Bacarisse
Mr. Ward Larkin

CAUSE NO. 97-30752

WARD S. LARKIN **Plaintiff**	§	**IN THE CIVIL DISTRICT COURT**
VS.	§	**OF HARRIS COUNTY, TEXAS**
CompUSA, INCORPORATED and MICHAEL JOHNSON **Defendant**	§	**133RD JUDICIAL DISTRICT**

ORDER

(Filed Mar. 31, 1998)

On this day came on to be considered Plaintiff's Motion for New Trial. After duly considering the same, the motion is hereby ~~GRANTED~~ [Denied].

IT IS THEREFORE ORDERED that ~~this cause is hereby set for trial on the ___ day of ___, 1998~~ [Plaintiff motion for New Trial is denied].

Signed on this the 15 day of June, 1998.

/s/ Lamar McCorkle
JUDGE PRESIDING

[Seal]

THE ATTORNEY GENERAL
OF TEXAS

May 11, 1988

JIM MATTOX
ATTORNEY GENERAL

Honorable David H. Cain
Texas House of Representatives
P.O. Box 2910
Austin, TX 78769

Opinion No. JM-900

Re: Whether the use of "abusive, indecent, profane or vulgar" language in a public place constitutes an immediate breach of the peace (RQ-1378)

Dear Representative Cain:

Section 42.01 of the Penal Code provides in part that

> (a) A person commits an offense if he intentionally or knowingly:
>
> (1) uses abusive, indecent, profane, or vulgar language in a public place, *and the language by its very utterance tends to incite an immediate breach of the peace*[.] (Emphasis added.)

Penal Code § 42.01(a)(1).

You ask the following questions:

> (1) Does uttering abusive, indecent, profane, or vulgar language in a public place constitute an immediate 'breach of the peace?'
>
> (2) How is 'breach of the peace' defined in relation to Article 42.01(a)(1)?

In order for this provision to withstand scrutiny under the broad guarantees for freedom of expression and due process of law in the United States Constitution, the utterances prohibited can *only* include "fighting words." *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942). *See Gooding v. Wilson,* 405 U.S. 518 (1972) and *Acker v. Texas,* 430 U.S. 962 (1977). *See also* Attorney General Opinion MW-1 (1979).[1]

Whether particular words are "fighting words" is a matter of fact. *Chaplinksy, supra,* at 573.

> The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . Derisive and annoying words can be taken as coming within the purview of the statute . . . only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace.

See *Gooding v. Wilson, supra,* at 522, quoting with approval of the Supreme Court of New Hampshire, 18 A.2d 754, 758, 762 (1941). *See generally, Cohen v. California,* 403 U.S. 15, 20 (1971); *Bachellar v. Maryland,* 397 U.S. 564, 567 (1970); and *Gooding, supra.* The "line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn," *Speiser v. Randall,* 357 U.S. 513, 525 (1958).

Speech punishable under the Penal Code provision does not include language merely harsh and insulting,

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[1] This statute does not concern speech legally obscene under the standards provided by the United States Supreme Court in *Miller v. California,* 418 U.S. 915 (1973). *See Spears v. State,* 337 So.2d 977 (Fla. 1976).

see Gooding, supra at 525, and it should not include speech, actual or symbolic, that is only "inappropriate," "naughty," "disgusting," "repulsive," "tactless," "gross," or "appalling." Annot., 2 A.L.R.4th 1331. Conviction under a statute specifically a "breach of the peace" as an element of the offense must be based on jury instructions including an admonition that proof of "actual or threatened violence is essential." *Woods v. State*, 213 S.W.2d 685, 687 (Tex. Crim. App. 1948). In other words, anything short of the use of "fighting words" does not constitute a breach of the statute. *See Jimmerson v. State*, 561 S.W.2d 5 (Tex. Crim. App. 1978). Speech is protected against punishment unless "shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Terminello (sic) v. Chicago*, 337 U.S. 1, 4 (1949).

Finally, because the application of the statute may turn largely on the factual setting of the speech at issue, the test is whether, in a particular instance, an average person would be inured to respond by fighting. An average person is not someone who is overly sensitive or overly inured to the speech in question. *Cohen, supra* and *Houston v. Hill*, 482 U.S. ___, 96 L.Ed2d 398 (1987), quoting from a concurring opinion of Justice Powell in *Lewis v. New Orleans*, 415 U.S. 130, 135 (1974).

SUMMARY

Article 42.01(a)(1) of the Penal Code applies only to speech which as a matter of fact constitutes "fighting words." As a matter of law, the statute does not reach speech that merely causes public inconvenience, annoyance, or unrest.

"Fighting words" are words which would likely cause an average addressee to fight. An "average addressee" is not someone either overly sensitive or overly inured to the speech in question.

Very truly yours,
/s/ Jim Mattox
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Supreme Court, U.S.
FILED
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CLERK

No. 01-0981

In The

Supreme Court of the United States

WARD S. LARKIN,

Petitioner,

v.

COMPUSA, INC. & MICHAEL JOHNSON,

Respondents.

On Petition For Writ Of Certiorari To The Texas Court Of Appeals For The Fourteenth Judicial District Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Should this Court grant certiorari, either for jurisdictional or prudential reasons, where the Petitioner fails to plead or assert Federal claims in the Texas courts, fails to raise a Federal claim as a bar to the application by the Texas courts of an affirmative defense to the Petitioner's State claims, and fails to properly raise, argue, and brief a Federal claim pursuant to State procedural law?

Should this Court grant certiorari, where only Texas common law claims were raised by the Petitioner, where the Texas courts disposed of the State claims based on Texas common law immunity and where the Texas courts never addressed the Federal claim allegedly raised by the Petitioner?

LIST OF PARTIES

PETITIONERS:

Ward S. Larkin

RESPONDENTS:

CompUSA, Inc.
Michael Johnson

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CITATION OF LOWER COURT OPINION

Larkin v. Johnson, 44 S.W.3d 188 (Tex. App. – Houston [14th Dist.] 2001, pet. denied) (attached at Petitioner's Appendix, pp. 1-5).

STATEMENT OF THE CASE

Petitioner, Ward S. Larkin, filed suit against Respondents, CompUSA, Inc. and Michael Johnson, on June 10, 1997 wherein he alleged Texas common law causes of action for false arrest, false imprisonment, battery, malicious prosecution, and intentional infliction of emotional distress. *CR 3.*[1]

Respondent Johnson ("Deputy Johnson") generally agrees that Petitioner's restatement of the facts of the case in his "Statement of the Case" are accurate. However, some discrepancies in Petitioner's restatement are worth noting. Petitioner declares that "the charges against Larkin were dismissed for insufficient evidence." *Petition for Writ of Certiorari* at 5 (*"Petition"*). Deputy Johnson objected to this statement in the court of appeals as it was not supported by the record. *Appellee Johnson's Brief* at 6 n.7. Deputy Johnson maintains his objection.

Petitioner admitted that the volume of the statements directed at Deputy Johnson were "louder than conversational." *CR 214.* Deputy Johnson described Mr. Larkin's statements as "loud and abrupt." *CR 74.* Counting customers and employees, approximately twenty people

[1] For purposes of clarity, the Clerk's Record will be referred to as "CR."

were present during this incident. *Id.* Deputy Johnson was sure that the other people in the store overheard Petitioner. *CR 74.* Deputy Johnson observed that Petitioner was acting in an "irrational" and "alarming manner." *CR 152.* Deputy Johnson also observed that "several customers and employees in the area . . . appeared to be equally alarmed and confused" as was Deputy Johnson. *Id.* Based on Petitioner's actions, the language used, and the reaction of the people witnessing the incident, Deputy Johnson then decided to detain Mr. Larkin for disorderly conduct.[2] *CR 89, 91 & 153.* After Petitioner refused to submit to Deputy Johnson's detention, Deputy Johnson called the intake or screening attorney at the office of the Harris County District Attorney wherein charges for evading detention were accepted,[3] *CR 113.*

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[2] In pertinent part, "Disorderly Conduct" is as follows in Texas law:

> (a) A person commits an offense if he intentionally or knowingly:
>
> (1) uses abusive, indecent, profane, or vulgar language in a public place, and the language by its very utterance tends to incite an immediate breach of the peace;

TEX. PEN. CODE ANN. § 42.01(a)(1) (Vernon 1994).

[3] While it is not clear from the record whether Mr. Larkin was charged with a Class B misdemeanor or a Class A misdemeanor under the "Evading Arrest or Detention" statute, the underlying offense is as follows:

> A person commits an offense if he intentionally flees from a person he knows is a peace officer attempting lawfully to arrest or detain him.

TEX. PEN. CODE ANN. § 38.04(a) (Vernon 1994).

Deputy Johnson also disputes Petitioner's repeated assertions throughout his Petition for Writ of Certiorari that he raised a Federal claim under the freedom of speech clause of the First Amendment before the Texas appellate courts. *See Petition* at 5-7. It is apparent that no Federal claim was properly raised when Petitioner's statements are read in context.

As noted above, Petitioner's claims were all tort claims under Texas common law. *See CR 3.* Deputy Johnson moved for summary judgment under the doctrine of official immunity, a State law affirmative defense.[4] *CR 14-154.* Petitioner first asserts that he "raised the federal question of Freedom of Speech under the Fighting Words Doctrine" in his response to Deputy Johnson's motion for summary judgment. *Petition* at 5. In fact, the quoted discussion comes from Petitioner's response to CompUSA's motion for summary judgment wherein Petitioner argued that a material issue of fact existed as to whether CompUSA could be liable under a respondeat superior theory for the acts of Deputy Johnson. *See CR 222-224.* Petitioner's argument was that Petitioner could not have committed the crime of Disorderly Conduct which meant that Deputy Johnson was enforcing "house rules" as opposed to State law when he attempted to detain and eventually arrested Petitioner. *Id.* Therefore, CompUSA could be held liable for the acts of its ostensible agent, Deputy Johnson. *Id.* In the portion of Petitioner's response which addressed Deputy Johnson's motion for

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[4] The elements of this doctrine, as well as some explanation of its application in Texas, are detailed below.

summary judgment, Petitioner did not raise or discuss any Federal claims.[5] *See CR 224-228.*

The trial court granted Deputy Johnson's motion for summary judgment on the only ground asserted by Deputy Johnson, official immunity. *CR 272.* Petitioner moved for a new trial wherein he reiterated verbatim the same paragraph already cited, *see Petition* at 5, and stated that Texas courts have held that the disorderly conduct statute only proscribes "fighting words." *Petition* at 6 (citing *CR 262-263*). Again, these assertions, assuming they sufficiently raised a Federal claim, were expressly raised in response to the trial court's granting of CompUSA's summary judgment and to support his argument that a new trial was proper because "[t]he determinative, unresolved fact issue is whether Plaintiff's arrest arose out of Johnson performing a duty assigned to him by CompUSA." *CR 261.* With regard to Deputy Johnson, Petitioner merely

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[5] Petitioner also asserts that he raised a Federal issue when he stated in his response, "[w]hether Plaintiff committed the crime of disorderly conduct or was exercising his right to Free Speech is a fact question in dispute." *Petition* at 5-6 (citing *CR 228*). However, this statement was merely a restatement in the "Conclusion" of his response that material fact issues precluded the trial court from holding that CompUSA could not be liable under a theory of respondeat superior for the alleged torts of Deputy Johnson. With regard to Deputy Johnson's motion for summary judgment based on official immunity, Petitioner concluded: "Deputy Johnson is not entitled to summary judgment because there is a dispute of material fact as to whether he was acting within the scope and course of his duties as a law enforcement officer and whether he was acting in good faith." *CR 228-229.* Good faith and scope of authority are two of the three official immunity elements.

argued that material issues of fact precluded the establishment of official immunity by Deputy Johnson. *See CR 266-269.*

Petitioner then appealed to the Fourteenth Court of Appeals in Houston, Texas. Here, he submitted a brief that copied verbatim his response to the Respondents' motions for summary judgment. *Compare CR 220-229 with Appellant's Brief at 2-9.* He again referred to "the same Fighting Words Doctrine argument," *Petition* at 6, in support of his argument that CompUSA could be liable under a respondeat superior basis and that material issues of fact precluded granting CompUSA summary judgment on this issue. *Appellant's Brief* at 2-5. He again asserted that material issues of fact precluded Deputy Johnson's official immunity defense at the summary judgment stage. *Appellant's Brief* at 5-8. Petitioner neither raised a new Federal claim, argued the trial court errantly denied a Federal claim, nor asserted that Federal law barred Deputy Johnson's assertion of official immunity. The opinion of the court of appeals neither referred to nor addressed any Federal claims. *See Larkin v. Johnson,* 44 S.W.3d 188 (Tex. App. – Houston [14th Dist.] 2001, pet. denied) (attached at Petitioner's Appendix, pp. 1-5). The opinion affirmed that Deputy Johnson was entitled to official immunity. *Larkin,* 44 S.W.3d at 190.

Petitioner filed a motion for rehearing before the Fourteenth Court of Appeals wherein he argued that the court failed to "properly measure [Petitioner's] conduct against the accepted standard objective reasonableness" of two cases of this Court. *Court of Appeals Motion for Rehearing* at 6. However, this passage was contained in an argument that the court of appeals misconstrued the

good faith element of the official immunity doctrine, *id.* at 4-6, an element which is measured against a test of "objective legal reasonableness." *Larkin*, 44 S.W.3d at 190. In substance, the Petitioner was merely criticizing the manner in which the State courts formulated and applied an element of a State law defense, the good faith element of the official immunity defense.

In his petition for review to the Texas Supreme Court, Petitioner asserted that the Texas Disorderly Conduct statute had been construed by Texas courts as applying only to "fighting words." *Petition* at 7-8 (quoting *Petition for Review* at 7). This assertion was in support of Petitioner's argument that he did not, in fact, commit a violation of the Disorderly Conduct statute. *Petition for Review* at 7-8. Even assuming Petitioner's assertion was correct, he again failed to raise an independent Federal claim, assert that a lower court had errantly failed to address an independent Federal claim, or to allege that a Federal claim barred Deputy Johnson's use of the Texas official immunity defense.

Petitioner's motion for rehearing from the denial of his petition for review by the Texas Supreme Court asserted that the Texas Supreme Court erred by not issuing a full, written opinion addressing all of Petitioner's issues, that the court of appeals violated the Texas Constitution's separation of powers provisions, that the Texas Supreme Court was biased against Petitioner, and that Deputy Johnson's summary affidavits were insufficient. *Texas Supreme Court Motion for Rehearing* at 3. Again, no Federal claims were raised, argued or briefed before the Texas Supreme Court.

REASONS FOR DENYING THE WRIT

The Court should deny the Petition for Writ of Certiorari for several reasons. First, Petitioner's Federal constitutional claim[6] was never pleaded, it was never raised, argued or briefed in any document or brief filed with any Texas court, and it was never raised as a bar to Deputy Johnson's assertion of Texas official immunity. Petitioner's failure to preserve his Federal claim counsels against the Court granting a writ of certiorari. Second, Petitioner only pleaded claims under the Texas common law. This Court should not take jurisdiction over this case where Petitioner's State claims were dismissed under a State immunity doctrine and, even assuming Petitioner properly raised his Federal claim before the Texas courts, the Texas courts failed to address Petitioner's Federal claim.

A. The Court Should Deny the Petition Because Petitioner's Federal Claim was Never Preserved in the Texas Courts

The Court should decline to accept jurisdiction over this case because Petitioner utterly failed to preserve the

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[6] Although not clear, Petitioner's Federal claim appears to be based on the free speech clause of the First Amendment. Petitioner refers to the "Fighting Words Doctrine" and his right to free speech throughout his Petition. However, Petitioner twice asserts that his constitutional right to equal protection of the laws was violated. *See Petition* at 9 & 28. Although the distinction is irrelevant to the discussion that follows, Deputy Johnson will assume that Petitioner's claim is based on the free speech clause of the First Amendment.

Federal claim pursuant to clearly established Texas law that he now asserts before the Court.

Petitioner's pleading only raised Texas common law causes of action: false arrest, false imprisonment, battery, malicious prosecution, and intentional infliction of emotional distress. *CR 3*. Nowhere in his pleading does he allege that his Federal rights were infringed by any defendant. A pleading in a Texas trial court must contain "a statement in plain and concise language on the plaintiff's cause of action." TEX. R. CIV. P. 45(b). Moreover, the pleading "shall contain a short statement of the cause of action sufficient to give fair notice of the claim involved." TEX. R. CIV. P. 47(a). Texas courts hold that the failure to include a cause of action in a pleading precludes recovery on that ground. *See Jay Fikes & Assoc. v. Walton*, 578 S.W.2d 885, 889 (Tex. Civ. App. – Amarillo 1979, writ ref'd n.r.e.); *B.L. Nelson & Assoc. v. City of Argyle*, 535 S.W.2d 906, 910-11 (Tex. Civ. App. – Fort Worth 1976, writ ref'd n.r.e.).

In addition, it was noted above that Petitioner failed to raise in the Texas appellate courts as error the trial court's apparent disregard of Petitioner's alleged Federal claim. Instead, Petitioner merely argued that Deputy Johnson was an agent of CompUSA when he allegedly performed the tortious acts complained of by Petitioner and in doing so he alleged that his words to Deputy Johnson were not "fighting words." In order to preserve error in a Texas trial court, one must comply with the following:

> As a prerequisite to presenting a complaint for appellate review, the record must show that:

> (1) the complaint was made to the trial court by a timely request, objection, or motion that:
>
> > (A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and
> >
> > (B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Appellate Procedure; and
>
> (2) the trial court:
>
> > (A) ruled on the request, objection, or motion, either expressly or implicitly; or
> >
> > (B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.

TEX. R. APP. P. 33.1(a). In *Metts v. State*, 22 S.W.3d 544 (Tex. App. – Fort Worth, 2000, no pet.), the appellant complained on appeal for the first time that the admission of certain evidence during his criminal trial violated his rights to due process. The court refused to consider this assignment of error holding, "Because appellant did not voice his due process objection at trial, he has waived his right to complain on that basis on appeal." *Metts*, 22 S.W.3d at 549. Petitioner similarly failed to raise any Federal claim, defense or objection in the trial court and thus waived his right to review on that issue.

Texas courts expressly hold that constitutional issues not properly preserved are waived and will not be considered on appeal. *See Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex. 1993); *Wood v. Wood*, 159 Tex. 350, 320 S.W.2d 807, 813 (1959); *In re K.C.M.*, 4 S.W.3d 392, 394 (Tex. App. – Houston [1st Dist.] 1999, pet. denied); *Matter of W.A.B.*, 979 S.W.2d 804, 808 (Tex. App. – Houston [14th Dist.] 1998, pet. denied).

Finally, Texas courts require that briefs on appeal "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(h) (rule applicable in intermediate courts); *see also* TEX. R. APP. P. 53.2(i) (same for petitions for review in the Texas Supreme Court); TEX. R. APP. P. 55.2(i) (same for petitioner's brief on the merits in Texas Supreme Court). Texas courts strictly enforce these briefing requirements. In *Tacon Mech. Contr's, Inc. v. Grant Sheet Metal, Inc.*, 889 S.W.2d 666 (Tex. App. – Houston [14th Dist.] 1994, writ denied), the appellant raised three points of error each complaining of the legal and factual sufficiency of the evidence. The court held that the appellant's briefing omissions resulted in waiver of those points:

> Under these points, Tacon provides no citations to the record and cites no authority. The argument presented is conclusory. Where, an appellant's points of error are not supported by authorities, citation to the record, and contain mere conclusory argument, those points are waived.

Tacon at 671. *Accord Burns v. State*, 923 S.W.2d 233, 237 (Tex. App. – Houston [14th Dist.] 1996, pet. ref'd) (conclusory point with no supporting authority presents nothing for review); *Rauscher Pierce Refsnes, Inc. v. Great*

S.W. Sav., 923 S.W.2d 112, 116-117 (Tex. App. – Houston [14th Dist.] 1996, no writ) (general argument without authority "not in minimal compliance" and therefore waived).

Recently, the Court reaffirmed that it would not review a state court judgment unless a petitioner's federal claim "was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997). As in *Adams*, it is clear that the Texas courts never addressed Petitioner's newly asserted Federal claim. *Id.* It is the Petitioner's burden to show the claim was properly presented:

> When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, and the aggrieved party beats the burden of defeating this assumption by demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented here."

Id. at 86-87 (citations omitted). Similarly, Petitioner has not satisfied and cannot satisfy his burden to show the claim was properly presented to the Texas appellate courts. The Court also held that the discussion of a federal case "in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim" and that the claim was therefore not presented "with 'fair precision and in due time.' " *Id.* at 88. Petitioner's attempts to do the same thing are equally unavailing.

In *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), the petitioners cited a Federal case

relating to selective enforcement while arguing about the construction of a state statute. *Id.* at 550 n.9. This Court refused to address the claim and held, "This casual reference to a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim subject to our appellate jurisdiction under 28 U.S.C. § 1257(2)." *Id.* In the case at bar, Petitioner cited two Federal cases and declared that he did not use "fighting words" while arguing that CompUSA could be held liable under a respondeat superior theory for state law tort claims. Petitioner did not adequately inform the Texas courts that he was asserting a Federal claim. *Accord Webb v. Webb*, 451 U.S. 493, 495-502 (1981) (Federal full faith and credit argument not properly raised in state court and state court did not pass on issue so Court was without jurisdiction to review claim); *Beck v. Washington*, 369 U.S. 541, 549-554 (1962) (state supreme court only addressed interpretation of state statute and Federal equal protection claim was not properly raised or briefed, so Court refused to address equal protection claim).

This Court should deny the Petition for Writ of Certiorari because Petitioner never pleaded or raised a Federal claim in the lower proceedings, and assuming *arguendo* that he did, he failed to properly argue and preserve the issue for this Court's review.

B. The Court Should Deny the Petition Because Petitioner's Claims Were Determined on Adequate and Independent State Grounds

Throughout the course of proceedings in this case, the only issue asserted by Deputy Johnson and the only issue addressed by the Texas courts with regard to Deputy Johnson was whether Deputy Johnson was entitled to official immunity. A synopsis of the official immunity defense is worth considering.

Government officials in Texas are entitled to official immunity from suit arising from discretionary acts within the scope of their authority when performed in good faith. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). A discretionary act is one which "involves personal deliberation, decision and judgment." *City of Lancaster*, 883 S.W.2d at 654. Petitioner conceded below that Deputy Johnson's acts were discretionary under Texas law. *See Appellant's Brief* at 6.

A government official in Texas acts in the scope of her authority "if she is discharging the duties generally assigned to her." *Chambers*, 883 S.W.2d at 658. Whether an officer performs illegal acts or acts negligently is not determinative of whether the officer is performing within the scope of her authority. *Id.* Under Texas law, a peace officer is on-duty once she witnesses what she believes was criminal activity and must react accordingly. *See* Tex. Code Crim. Proc. Ann. art. 2.13 (Vernon 1977); Tex. Code Crim. Proc. Ann. art. 14.01(b) (Vernon 1997). Texas courts have interpreted these statutes as so requiring. *See Hafdahl v. State*, 805 S.W.2d 396, 401 (Tex. Crim. App. 1990) (en banc) ("when the police officer stopped at the scene

of the accident and approached appellant shouting 'halt, halt, stop, police,' the officer was no longer off duty"); *Selvage v. State*, 680 S.W.2d 17, 21 (Tex. Crim. App. 1984) (en banc) (uniformed officer in jewelry store on personal business was "in lawful discharge of official duty" when he began to investigate suspicious customer who subsequently shot officer dead and robbed store); *Villegas v. Griffin Indus.*, 975 S.W.2d 745, 754 (Tex. App. – Corpus Christi 1998, pet. denied) (off-duty officers doing investigative work for a private company were held to be on-duty peace officers who could arrest the suspects without a warrant, and hence acted under authority of law, because the officers "reasonably believed a crime had been committed"). The Court of Appeals properly held under Texas law that Deputy Johnson was acting in the scope of his authority. *Larkin*, 44 S.W.3d at 189 & 190 (see also *Petition* at Appendix 2-4).

Generally stated, the good faith element of the official immunity inquiry asks whether a reasonably prudent officer could have believed that the same action taken was justified under the same or similar circumstances known to the officer at the time. *Chambers*, 883 S.W.2d at 656. The burdens of the summary judgment movant and nonmovant were described by the Texas Supreme Court as follows:

> *The "could have believed" aspect of the good faith test means that in order to be entitled to summary judgment, an officer must prove that a reasonably prudent officer might have believed that the pursuit should have been continued.* It does not mean that an officer has to prove that it would have been unreasonable to stop the pursuit; nor must the officer prove that all reasonably prudent officers

> would have continued the pursuit. *To controvert the officer's summary judgment proof on good faith,* the plaintiff must do more than show that a reasonably prudent officer could have decided to stop the pursuit; *the plaintiff must show that "no reasonable person in the defendant's position could have thought the facts were such that they justified the defendant's acts."*

Chambers at 656-57 (citations omitted) (emphasis added). In sum, the *Chambers* good faith test asks whether a reasonably prudent officer could have continued the action complained of considering the need to continue the action and considering the risks to the public in continuing the action, and under the same facts and circumstances. To rebut a showing of good faith, the plaintiff must come forward with evidence that "no reasonable person" could have thought the defendant's acts were justified under the facts and circumstances. The *Chambers* good faith test is not a general negligence test that asks "what a reasonable person would have done," but instead it asks "what a reasonable officer could have believed." *Wadewitz v. Montgomery*, 951 S.W.2d 464, 467 n.1 (Tex. 1997); *see Chambers* at 656 n.5. The *Chambers* need/risk assessment "is based on the officer's perception of the facts at the time of the event." *Bridges v. Robinson*, 20 S.W.3d 104, 111 (Tex. App. – Houston [14th Dist.] 2000, no pet.). "Evidence of negligence alone will not controvert competent evidence of good faith." *Wadewitz* at 467 n.1. An employee who is alleged to have committed an intentional tort may still have acted in good faith and may still be entitled to official immunity. *Davis v. Klevenhagen*, 971 S.W.2d 111, 113-14 & n.4 (Tex. App. – Houston [14th Dist.] 1998, no pet.) (citing cases).

"[I]n general, summary judgment is proper and immunity should be recognized on the good faith issue if officers of reasonable competence could disagree on the issue." *Geick v. Zigler*, 978 S.W.2d 261, 265 (Tex. App. – Houston [14th Dist.] 1998, no pet.). Based on Deputy Johnson's uncontroverted summary judgment evidence, the Court of Appeals held that Deputy Johnson acted in good faith under Texas law and it expressly stated that it would not address the merits of Petitioner's Texas claims because official immunity precluded such review. *Larkin*, 44 S.W.3d at 190 (see also *Petition* at Appendix 4).

This Court does not exercise jurisdiction over claims that were resolved in state courts on "adequate and independent" state grounds, regardless of whether those grounds are substantive or procedural. The Court has stated:

> This Court has long held that it will not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on a state-law ground that is both "independent" of the merits of the federal claim and an "adequate" basis for the court's decision. Although this doctrine originated in the context of state-court judgments for which the alternative state and federal grounds were both "substantive" in nature, the doctrine "has been applied routinely to state decisions forfeiting federal claims for violation of state procedural rules."

Harris v. Reed, 489 U.S. 255, 260-61 (1989) (citations omitted) (holding that "plain statement" rule applied to habeas corpus proceedings).

As discussed above, Petitioner clearly did not raise or preserve his Federal claim before the Texas courts.

Among other procedural rules cited above which would bar review of Petitioner's Federal claim, the Texas Supreme Court has made it clear that constitutional questions not raised in the trial court are waived and will not be addressed by the court. *Dreyer*, 871 S.W.2d at 698. Its insistence on raising the claim in the trial court has been applied consistently and serves a legitimate state purpose. *See Wainwright v. Sykes*, 433 U.S. 72, 86-90 (1977) (contemporaneous objection rule served legitimate state interests of judicial comity, the creation of a complete and comprehensive record, allows a judge to make proper factual determinations, may lead to finality in litigation and prevents sandbagging; therefore waiver of state procedural grounds was adequate and independent state ground for decision); *Stembridge v. State of Georgia*, 343 U.S. 541, 547-548 (1952) (it was clear to the Court that the Georgia Supreme Court took no action on Federal constitutional claim because it was not raised in the trial court and was not sufficiently briefed under Georgia procedure; "Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment.").

Finally, in *Black v. Cutter Laboratories*, 351 U.S. 292 (1956), an employee subject to dismissal only for "just cause" was terminated for lying on her application and for being a member of the Communist Party. *Black* at 293-94. After the California Supreme Court overturned an earlier reinstatement order, she petitioned for a writ of certiorari asserting that the court's decision violated her equal protection and due process rights. *Id.* at 295. The

Court found that the California court did not resolve the issue on Federal grounds:

> As such, the decision involves only California's construction of a local contract under local law, and therefore no substantial federal question is presented. Moreover, even if the State Court's opinion be considered ambiguous, we should choose the interpretation which does not face us with a constitutional question.

Id. at 299. The Court dismissed the writ. *Id.* at 300. In the case at bar, it is clear beyond dispute that the Texas courts addressed a Texas defense applicable only to Texas tort claims; it did not address any Federal questions nor was it required to do so. For this reason alone, the Court should decline to take jurisdiction over this petition as the Texas courts' ground for dismissing Petitioner's state law claims were independent and adequate under this Court's jurisprudence.

PRAYER

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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(3)

No. 01-981

IN THE

Supreme Court of the United States

WARD S. LARKIN,

Petitioner,

v.

COMPUSA, INC. AND MICHAEL JOHNSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTEENTH COURT OF APPEALS OF TEXAS

BRIEF IN OPPOSITION FOR RESPONDENT CompUSA, Inc.

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QUESTION PRESENTED

The only question presented is whether the Texas courts properly determined, as a matter of Texas law, that Michael Johnson was acting within his authority as a Texas peace officer when he arrested Ward S. Larkin, and not as an employee or agent of CompUSA, Inc.

STATEMENT PURSUANT TO RULE 29.6

Respondent CompUSA, Inc. is a privately held corporation. The following are its parent companies which are each publicly held and which each own or control 10% or more of the stock of CompUSA, Inc.: Grupo Carso, S.A. de C.V., Grupo Sanborne, S.A. de C.V., SBC Communications, Inc., Carso Global Telecom, S.A. de C.V. and America Movil, S.A. de C.V. Upon conclusion of a pending transaction, U.S. Commercial Corp., S.A. de C.V. will also have a 10% or more stock ownership interest in CompUSA, Inc.

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STATEMENT OF JURISDICTION

No jurisdiction exists in this Court. The decision of the Fourteenth Court of Appeals of Texas was based on an independent state ground that is adequate to support the judgment. The Texas Supreme Court refused to consider this case. Further, no federal question was raised and decided in the Texas courts.

COUNTER-STATEMENT OF THE CASE

Ward S. Larkin ("Larkin") brought suit against CompUSA, Inc. ("CompUSA") seeking to hold CompUSA vicariously liable for intentional torts allegedly committed by Harris County Deputy Sheriff Michael Johnson ("Johnson") arising from Larkin's arrest outside a CompUSA store on September 17, 1996. (Cl. R. at 2-6). As a "side-job," in addition to his full-time employment as a Harris County Deputy Sheriff, Johnson had been retained by CompUSA to work in his off-duty hours providing security for CompUSA. (*See generally* Cl. R. at 161-215.) Johnson wore his official uniform while working the assignment. (Cl. R. at 165, 187, 199). Johnson had sought and obtained the approval of the Harris County Sheriff's Office to work for CompUSA in this capacity. (Cl. R. at 162-164).

On the afternoon in question, Johnson stood near the front door of the CompUSA store, checking receipts of customers as they left the store, confirming that the goods being taken out had been paid for, and marking the receipts after inspection. (Cl. R. at 164). Larkin visited the CompUSA store on that same day to purchase a mouse for a laptop computer. (Cl. R. at 199). Larkin purchased the mouse from a customer service representative. *Id.* After making the sale,

the customer service representative instructed Larkin to show the receipt for the merchandise purchased to the man at the door, indicating Johnson. *Id.*

Larkin testified that he then walked over to Johnson and held the receipt a couple of inches below the deputy's eye level. *Id.* Johnson tried to take the receipt out of Larkin's hand and began to mark it with a highlighter pen. (Cl. R. at 167, 187, 199-200, 207). Larkin became offended and immediately pulled the receipt back out of Johnson's hand. (Cl. R. at 167, 187-188, 200). As Larkin pulled his hand away he exclaimed in a loud voice, "What the hell are you doing?"[1] *Id.* Johnson responded with a puzzled "excuse me," and Larkin once again exclaimed the query, "What the hell are you doing?" in what Johnson believed to be a loud, disruptive manner and in the presence of other customers. (Cl. R. at 168, 171, 175).

As Larkin started to exit the store, Johnson identified himself as a peace officer and ordered Larkin to stop. (Cl. R. at 170-172, 191-192, 201). After a brief conversation with Johnson in the vestibule of the store, Larkin again turned away from Johnson and walked out an automatic sliding door onto the sidewalk in front of the store. (Cl. R. at 171-174, 191-192, 201). Johnson again ordered Larkin to stop. *Id.* Larkin did not comply. *Id.* At this point, Johnson again identified himself as a peace officer, stating that he was a Harris County Deputy Sheriff, and again ordered Larkin to stop. *Id.* Larkin nevertheless continued to walk away. *Id.* Larkin remembers that Johnson stated: "***I am ordering you as a Harris County Deputy Sheriff to come back here.***" (Cl. R. at 192) (emphasis added). Rather than comply

1. In his report generated contemporaneously with the incident Johnson stated that Larkin addressed him as a "mother-fucker" (Cl. R. at 167). Larkin himself alleges that Johnson was of this opinion on the date of the incident (Cl. R. at 3-4).

with this command, Larkin responded: "If you want me to stay here, you will have to arrest me." (Cl. R. at 173, 192). Larkin then turned away. *Id.*

Johnson caught up with Larkin by the time Larkin reached his car and arrested him for disturbing the peace and for evading detention. (Cl. R. at 170-174). Johnson subsequently had Larkin transported to the Harris County jail system. (Cl. R. at 174-175, 202). Larkin admitted that he was aware that Johnson was a sheriff's deputy, rather than a security guard, when Johnson identified himself as such. (Cl. R. at 191-192, 201).

Larkin filed suit in the 133rd Judicial District Court of Harris County, Texas against Johnson and CompUSA alleging false imprisonment, battery, malicious prosecution, and intentional infliction of emotional distress against Johnson, and *respondeat superior* as to CompUSA. (Cl. R. at 2-5).

The Trial Court granted summary judgment to CompUSA. (Cl. R. at 258). The Court of Appeals affirmed the summary judgment in favor of CompUSA, stating,

> There is no contention that Johnson enforced any CompUSA policy or advanced CompUSA's interests when he went outside and arrested a paying customer. Thus, there is no issue of material fact about whether Johnson was acting as an employee of the Harris County Sheriff's office when he arrested a person who refused to comply with the officer's attempt to detain him.

(Petition for Writ at App. 2–3).

REASONS FOR DENYING THE WRIT

A. The decision of the Texas appellate court is based on an independent state ground that is adequate to support the judgment.

Larkin claims CompUSA is vicariously liable for Johnson's alleged intentional torts because Johnson was CompUSA's contract employee. Summary judgment was granted to CompUSA by the Trial Court and affirmed by the Fourteenth Court of Appeals based on the courts' finding as a matter of Texas law that Johnson acted within his authority as a peace officer when he arrested Larkin. (Petition for Writ at App. 1-6).

In its decision, the Fourteenth Court of Appeals cited *Blackwell v. Harris County,* 909 S.W.2d 135, 139 (Tex. App. – Houston [14th Dist.] 1995, writ denied):

> *Blackwell* explains that where an officer is performing a job incident to enforcing the public laws, he is acting in the course and scope of his employment as a police officer even if the private employer directed him to perform the duty.

(Petition for Writ at App. 1-6). After considering Johnson's objective actions, the Court concluded:

> We find Johnson proved as a matter of law that he acted as a Harris County Deputy Sheriff rather than as an employee of CompUSA.

(Petition for Writ at App. 1).

Under Texas law, whether Larkin committed a crime has no bearing on Johnson's capacity at the time Johnson arrested Larkin. Larkin's argument that the Court of Appeals failed to

apply this Court's fighting words analysis when the Court affirmed the decision of the Trial Court is based on the false premise that in order to affirm summary judgment on behalf of CompUSA, the Appellate Court was required to find that Larkin had committed the crime of disorderly conduct.

Larkin admits that the Court of Appeals did not address the Fighting Words Doctrine, yet Larkin argues that, in affirming the summary judgment, the Court held by default that Larkin's statement, "What the hell are you doing?" constituted fighting words. (Petition for Writ at 8). Larkin is incorrect. The Court of Appeals did not address the Fighting Words Doctrine because whether Larkin's statement met the criteria for fighting words was not at issue.

Johnson arrested Larkin in connection with performing his public duties of enforcing substantive criminal law as Johnson understood it and not for any purpose related to CompUSA, regardless of whether Larkin committed either the offense of evading arrest or the offense of disorderly conduct. Larkin has asserted the proposition that the *only* time a peace officer acts in the capacity of a peace officer as a matter of law is when a crime has been committed in the officer's presence. However, this proposition is wholly inconsistent with the language of one of the principal Texas statutes governing the duties and powers of peace officers, which states:

> It is the duty of every peace officer to ***preserve the peace*** within his jurisdiction. To effect this purpose, he shall use all lawful means. He shall in every case where he is authorized by the provisions of this Code, ***interfere without warrant to prevent or suppress crime***.

TEX. CODE CRIM. PROC. art. 2.13 (emphasis added). This provision places a clear duty on peace officers to prevent and

suppress crime, rather than merely react to crime when it occurs. It follows that the scope of Johnson's authority as a public law enforcement agent, and the range of actions undertaken in the capacity of law enforcement agent, are much broader than Larkin suggests. *See Blackwell*, 909 S.W.2d 135.

As referenced above, the Fourteenth Court of Appeals pointed to *Blackwell* in its opinion. The *Blackwell* court held that an officer was acting within the scope of his employment as a law enforcement officer in directing traffic while escorting a funeral procession as a side-job in his off-duty hours. *Blackwell*, 909 S.W.2d at 137. In articulating the test applied to make this determination, the *Blackwell* court explicitly adopted the test employed by the Supreme Court of Virginia in *Glenmar Cinestate, Inc. v. Farrell*, 292 S.E.2d 366 (1982). The *Glenmar* test turns on one basic inquiry: "In what capacity was the officer acting at the time he committed the acts for which the complaint is made?" *Blackwell*, 909 S.W.2d at 139 (*citing Glenmar*, 292 S.E.2d at 369-70). Quoting the standard applied by the *Glenmar* court, the *Blackwell* court stated:

> If [the officer] is engaged in the performance of a public duty such as the enforcement of general laws, his [private or temporary] employer incurs no vicarious responsibility for his acts, even though the employer directed him to perform the duty. On the other hand, if he was engaged in the protection of the employer's property, ejecting trespassers or enforcing rules and regulations promulgated by the employer, it becomes a jury question as to whether he was acting as a public officer or as an agent servant of employer. [sic]

Blackwell, 909 S.W.2d at 139.

In *Glenmar*, the court considered whether an off-duty deputy sheriff was the agent or employee of the owner of a drive-in movie theater while working a side-job directing traffic in and out of the theater parking lot. *Glenmar*, 292 S.E.2d at 367. The plaintiff sought to hold the theater owner vicariously liable for the deputy's allegedly negligent misdirection of traffic, which had allegedly caused an accident in which the plaintiff had been injured. The court concluded that the officer's actions in directing traffic could not, as a matter of law, give rise to vicarious liability for the owner of the drive-in, stating:

> [A] special police officer appointed by public authority, but employed and paid by a private party, does not subject his employer to liability for his torts when the acts complained of are performed in carrying out his duty as a public officer.

Glenmar, 292 S.E.2d at 369. The court found that in directing traffic out of the theater, the deputy was "engaged in the performance of a public duty." *Glenmar*, 292 S.E.2d at 370. The court took particular note of the fact that even though the deputy took some direction concerning his job from the theater management, he acted on his own initiative and was self-directed and "chose his own methods" in undertaking the actions that formed the basis of the plaintiff's complaint. *Glenmar*, 292 S.E.2d at 369.

The circumstances surrounding Johnson's actions are virtually identical to those in *Glenmar*. Like the deputy in *Glenmar*, Johnson was a uniformed Sheriff's Department law enforcement officer working a side-job for a private employer in his off-duty hours. Furthermore, like the deputy in

Glenmar, at the time he performed the actions of which Larkin complains, Johnson was acting without any direction from CompUSA as to whether to make the arrest or the manner in which this task should be carried out. (Cl. R. at 177). Johnson had received specialized training in the procedures to be employed in making arrests, which he followed in arresting Larkin. (Cl. R. at 172-173). Indeed, it was Larkin himself who invited Johnson to arrest him, defiantly refusing to stop unless Johnson did so. (Cl. R. at 173, 192).

Clearly, the Fourteenth Court of Appeals based its decision on independent and adequate state court grounds and therefore, this Court lacks jurisdiction in this matter. *Murdock v. Memphis*, 87 U.S. 590, 22 L. Ed. 429, 20 Wall. 590 (1874). The Fourteenth Court of Appeals determined no federal question in deciding this case. In this context, this Court stated the following:

> It has long been settled that this Court acquires no jurisdiction to review the judgment of a state court of last resort on writ of error, unless it affirmatively appears upon the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court.

Mellon v. O'Neill, 275 U.S. 212, 48 S. Ct. 62, 72 L. Ed. 245 (1927).

B. The decision below was correct.

The Court of Appeals appropriately confirmed the Trial Court's summary judgment in favor of CompUSA on the grounds that at the time Johnson arrested Larkin for disturbing the peace and evading detention, Johnson was acting in the capacity of an on-duty police officer and, therefore, as a matter of law, not as CompUSA's employee or agent. (Petition for Writ at App. 1-6). *See, e.g., City of Dallas v. Half Price Books, Records, Magazines, Inc.*, 883 S.W.2d 374 (Tex. App. – Dallas 1994, no writ); *Leake v. Half Price Books, Records, Magazines, Inc.*, 918 S.W.2d 559 (Tex. App. – Dallas 1996, no writ). For this reason, CompUSA cannot be held vicariously liable for any intentional torts committed by Johnson.

Larkin's chief argument that the appellate court improperly affirmed the trial court's summary judgment is: (1) Larkin's repeated exclamations challenging Johnson's authority do not qualify as "Disorderly Conduct" within the meaning of TEX. PEN. CODE § 42.01; and (2) Johnson had no probable cause to arrest Larkin without a warrant. (Petition for Writ at 12-20). Notwithstanding Larkin's assertions — on the *undisputed* facts of this case, Larkin made public exclamations containing profanity in a loud and disruptive manner within sight and earshot of other store customers. (Cl. R. at 168, 171, 175). It is equally clear that Larkin repeatedly and knowingly refused to comply with the direct orders of a uniformed Harris County Deputy Sheriff, and literally invited the officer to arrest him. The uncontroverted facts of this case compel the conclusion that Johnson was acting in his capacity as a law enforcement officer *whether or not* any crime was actually committed under the technical statutory definitions.

Johnson was performing a task that involved approaching a suspect, handcuffing the suspect and remitting that suspect to the appropriate detention facilities for the jurisdiction in which Johnson had law enforcement authority. These actions are quintessential examples of actions taken in the capacity of a law enforcement agent, irrespective of the validity of the arrest or the ultimate supportability of the charges against Larkin. For this reason, it simply makes no sense to attribute any of these actions to CompUSA for the purposes of vicarious liability, and it makes even less sense to adopt Larkin's position that whether Johnson's actions can be attributed to CompUSA should somehow turn on whether Johnson properly interpreted and applied the penal laws that he understood at the time of the arrest.

CONCLUSION

For the foregoing reasons, CompUSA respectfully requests that this Honorable Court deny the petition.

Respectfully submitted,

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(4)

No. 01-981

Supreme Court, U.S.
FILED
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CLERK

In The

Supreme Court of the United States

WARD S. LARKIN,

Petitioner,

vs.

MICHAEL JOHNSON AND COMPUSA, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Texas Court Of Appeals For The Fourteenth Judicial District Of Texas

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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OTHER AUTHORITIES

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

Petitioner Ward Larkin just learned of constitutional violations that render judgment of the Texas 14th Court of Appeals void. When this case was submitted and argued before the Texas court of appeals, and when the Texas court of appeals handed down its decision, not one of the three justices on that panel had taken the oaths required by the Constitution of the United States and of the State of Texas.

U.S. Const. art. VI, cl. 3 provides that "all . . . judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation, to support this Constitution". Tex. Const. art. XVI, § 1(a) obligates all elected officers, and Tex. Const. art. XVI, § 1(c) obligates all appointed officers, to take the Oath of Office before they may enter upon the duties of their offices. Additionally, Tex. Const. art. XVI, § 1(b) obligates all elected officers to sign a statement of elected officer (an "anti-bribery oath"), and Tex. Const. art. XVI, § 1(d) obligates all appointed officers to sign a statement of appointed officer (a similar, but not identical "anti-bribery oath"), before they may take their Oath of Office. The statement of elected officer [per Tex. Const. art. XVI, § 1(e)], and the statement of appointed officer [per Tex. Const. art. XVI, § 1(f)], must be filed with the Texas Secretary of State before the Oath of Office may be taken.

Justices with the Texas court of appeals are elected judicial officers, but visiting justices may be appointed to assist in disposing of cases. See Tex. Gov't Code Ann. §§ 74 and 75. On December 21, 2000 Senior Justices Norman Lee and Ross Sears and Former Justice Maurice

Amidei – the three members of the panel in this case, and each a formerly elected Texas 14th Court of Appeals justice – were ordered to sit by assignment with the Texas 14th Court of Appeals between January 1, 2001 and March 31, 2001 by Thomas R. Phillips, Chief Justice, Texas Supreme Court by his authority under Tex. Gov't Code Ann. §§ 74.003, 75.002, and 75.003. [See this brief's App. 3-5.] Although otherwise qualified, none of these three men signed, or filed with the Texas Secretary of State, a statement of appointed officer relating to the January 1, 2001 to March 31, 2001 judicial assignment. Nor did any of them take the required Oath of Office.

Specifically, Maurice Amidei signed his statement of appointed officer on April 16, 2001, which was filed with the Texas Secretary of State on April 18, 2001. [See this brief's App. 2.] He then signed his Oath of Office as a Former Appellate Justice on May 9, 2001 [See this brief's App. 1], over 7 weeks after the January 1, 2001 to March 31, 2001 judicial assignment had expired. Norman Lee signed his statement of appointed officer on June 22, 2000, which was filed with the Texas Secretary of State on June 29, 2000. [See this brief's App. 6.] He then signed his Oath of Office as a Senior Justice on July 13, 2000 [See this brief's App. 7], almost six months before the January 1, 2001 to March 31, 2001 judicial assignment began. Ross Sears signed his statement of appointed officer on June 9, 2000, which was filed with the Texas Secretary of State on June 12, 2000. [See this brief's App. 8.] He then signed his Oath of Office as a Senior Appellate Justice on June 28, 2000 [See this brief's App. 9], over six months before the January 1, 2001 to March 31, 2001 judicial assignment started.

Petitioner obtained the records included within this brief's appendix by filing public information requests under Tex. Gov't Code Ann. § 552 with Gwyn Shea, Texas Secretary of State, and filing judicial records requests under Tex. R. Jud. Admin. Rule 12 with 1) Olen Underwood, Presiding Judge, Texas 2nd Administrative Judicial Region[1]; 2) Scott Brister, Chief Justice, Texas 14th Court of Appeals; 3) Thomas R. Phillips, Chief Justice, Texas Supreme Court; and 4) Maurice Amidei, Norman Lee, and Ross Sears individually. Per the Constitution, Laws and Judicial Rules of Texas, no other state agency or state officer should be in custody of the statements of appointed officer or the Oaths of Office for Maurice Amidei, Norman Lee or Ross Sears regarding their January 1, 2001 to March 31, 2001 judicial assignment.

The Texas courts have held that a judge is constitutionally disqualified if he or she hasn't taken the required oaths. *French v. Texas*, 572 S.W.2d 934, 939 (Tex. Crim. App. 1977) (on second motion for rehearing). The acts of a judge who is constitutionally disqualified are void, and may be challenged for the first time on appeal. See *Wilson v. Texas*, 977 S.W.2d 379, 380 n.3 (Tex. Crim. App. 1998); *Davis v. Texas*, 956 S.W.2d 555, 559 (Tex. Crim. App. 1997). Furthermore, former or retired judges assigned to judicial office by Tex. Gov't Code Ann. §§ 74 and 75 are appointed judicial officers, and they must sign a new statement of appointed officer and take a new Oath of Office for each new judicial assignment. See *Prieto Bail Bonds v. Texas*, 994 S.W.2d 316, 318-21 (Tex. App. – El Paso 1999,

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[1] The Texas 2nd Administrative Judicial Region oversees the Texas 14th Court of Appeals.

pet. ref'd). Petitioner recognizes that these citations reference only criminal cases. However, the rights of a civil litigant to present his or her case before a constitutionally qualified tribunal are equally protected under U.S. Const. amend. XIV.

Because Maurice Amidei didn't take his required Oath of Office as an appointed judicial officer until May 9, 2001, 39 days after the January 1, 2001 to March 31, 2001 judicial assignment had expired, he was constitutionally disqualified to act in this case. This case was submitted and argued on February 14, 2001, and judgment was rendered on March 22, 2001. Similarly, because Norman Lee and Ross Sears didn't take a new Oath of Office for the January 1, 2001 to March 31, 2001 judicial assignment, they were also constitutionally disqualified to act in this case.

No government officer is above the law. *Ruiz v. Estelle*, 679 F.2d 1115, 1163 (5th Cir. Tex. 1982) (holding that Texas statewide prison conditions were in violation of U.S. Const. amend. VIII) concluded its lengthy opinion on that extremely serious issue by explaining how important it is for state officials in general, and the judiciary in particular, to swear to defend the U.S. Constitution: "The Federal Constitution is a charter for all officials, federal and state. All those who wield the power of the sovereign must be equally obedient to its commands and faithful in ensuring its protections. They take the same oath we do – to uphold and to defend it."

Moreover, the fundamental philosophy of the American constitutional form of representative government holds to the principle that the Constitution of the United

States of America is the supreme law of the land. Every officer of every state owes it his or her sworn obedience:

> It merits particular attention in this place, that the laws of the Confederacy, as to the *enumerated* and *legitimate* objects of its jurisdiction, will become the SUPREME LAW of the land; to the observance of which all officers, legislative, executive, and judicial, in each State, will be bound by the sanctity of an oath. Thus the legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government *as far as its just and constitutional authority extends;* and will be rendered auxiliary to the enforcement of its laws. *The Federalist* No. 27, p. 177 (Mentor Book ed. 1961) (A. Hamilton).

CONCLUSION

For the foregoing reasons, Petitioner asks the Court to remand for appropriate findings of fact before making a determination on the Petition for Writ of Certiorari.

Respectfully submitted,

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In the name and by the authority of

The State of Texas

OATH OF OFFICE

I, Maurice Eneas Amidei, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of Former Appellate Justice of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State, so help me God.

/s/ Maurice Eneas Amidei
Affiant

SWORN TO and subscribed before me by affiant on this 9th day of May, 2001.

/s/ Rebecca McMahon
Signature of Person
Administering Oath

/s/ REBECCA McMAHON
Printed Name

Notary Public
Title

[SEAL] REBECCA MCMAHON
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
JULY 9, 2002

[SEAL]

STATEMENT OF APPOINTED OFFICER

(Pursuant to Tex. Const. art. XVI. § 1(d), amended 1989)

(Filed in the Office of Secretary of State Apr. 18, 2001
Statutory Filings Division Statutory Documents)

I, Maurice Eneas Amidei, do solemnly swear (or affirm), that I have not directly or indirectly paid, offered, promised to pay, contributed, or promised to contribute any money, or valuable thing, or promised any public office or employment, as a reward to secure my appointment or confirmation thereof, so help me God.

Maurice Eneas Amidei
Affiant's Signature

Assigned Former Justice	Houston, Harris County, Texas
Position to Which Appointed	City and/or County

SWORN TO and subscribed before me by affiant on this 16th day of April, 2001.

/s/ James Dukett
Signature of Person Authorized to Administer Oaths/Affidavits

/s/ James Dukett	Notary
Printed Name	Title

[SEAL] JAMES A. DUKETT
Notary Public
STATE OF TEXAS
My Comm. Exp. 01-31-2005

[SEAL]

ORDER

December 21, 2000

TO:

Chief Justices, Courts of Appeals
Hon. Maurice Amidei
Hon. Eric Andell
Hon. Charles Baird
Hon. Bill Bass
Hon. Shirley Butts
Hon. Charles Campbell
Hon. Bill Cannon
Hon. Bobby L. Cummings
Hon. Carl Dally
Hon. Tom G. Davis
Hon. Bob Dickenson
Hon. Carlton B. Dodson
Hon. Joe L. Draughn
Hon. F. Lee Duggan, Jr.
Hon. Frank G. Evans
Hon. David Farris
Hon. John Hill
Hon. Camille Hutson-Dunn
Hon. Noah Kennedy
Hon. Ward L. Koehler
Hon. Norman Lee
Hon. Frances Maloney
Hon. Austin McCloud
Hon. Frank McDonald
Hon. Chuck Miller
Hon. John F. Onion, Jr.
Hon. H. Brian Poff
Hon. John Powers
Hon. Frank Price
Hon. Charles L. Reynolds
Hon. David Richards
Hon. Sam Robertson
Hon. Barbara Rosenberg
Hon. Ross Sears
Hon. Jackson B. Smith, Jr.
Hon. Ruby Sondock
Hon. Rose Spector
Hon. Annette Stewart

FROM: Chief Justice Thomas R. Phillips

RE: Assignments of Judges to Courts of Appeals

Pursuant to the authority vested in me as Chief Justice of the Supreme Court of Texas by §§ 74.003, 75.002, and 75.003 of the Texas Government Code, the following assignments are made, effective January 1, 2001 through March 31, 2001:

These seventeen assignments are made primarily for the Target Docket Reduction Program (Rider 4 to the FY 2000-2001 appropriation to the Supreme Court by H. B. 1, 76th Legislature, Regular Session):

To the First Court of Appeals: F. Lee Duggan, Jr., Frank C. Price, and Jackson B. Smith, Jr.;

To the Fifth Court of Appeals: Carlton B. Dodson, David Farris, H. Bryan Poff, Jr., Barbara Rosenberg, Rose Spector, and Annette Stewart.

To the Fourteenth Court of Appeals: Maurice Amidei, Eric Andell, Bill Cannon, Joe L. Draughan, Camille Hutson-Dunn, Norman Lee, Sam Robertson, and Ross A. Sears.

These five assignments are made with direction that these judges be assigned primarily to panels that consider cases in which oral argument has been waived:

To the Fifth Court of Appeals: Bill Bass, Shirley Butts, Charles Campbell, Ward L. Koehler, and Chuck Miller.

These seventeen assignments are made for the type of tasks and volume of work as may be mutually determined by the assigned judges and the Chief Justice of the court to which assigned:

To the First Court of Appeals: Frank G. Evans
To the Second Court of Appeals: John Hill
To the Third Court of Appeals: Carl Dally, Tom G. Davis, John F. Onion, Jr., and John Powers.
To the Fifth Court of Appeals: Frances Maloney
To the Seventh Court of Appeals: Charles L. Reynolds

To the Tenth Court of Appeals: Bobby L. Cummings, Frank G. McDonald, and David Richards
To the Eleventh Court of Appeals: Bob Dickenson and Austin McCloud
To the Thirteenth Court of Appeals: Noah Kennedy
To the Fourteenth Court of Appeals: Maurice Amidei, Charles Baird and Ruby Sondock

All of these assignments shall continue for such period of time as may be necessary to complete consideration of the cases heard and to pass on motions for rehearing relating thereto.

These assignments do not preclude others being made.

/s/ Thomas R. Phillips
Thomas R. Phillips
Chief Justice

December 21, 2000

(SEAL)

STATEMENT OF APPOINTED OFFICER

(Pursuant to Tex. Const. art. XVI, §1(d), amended 1989)

(Filed in the Office of Secretary of State Jun. 29 2000
Statutory Filings Division Statutory Documents)

I, NORMAN R. LEE, do solemnly swear (or affirm), that I have not directly or indirectly paid, offered, promised to pay, contributed, or promised to contribute any money, or valuable thing, or promised any public office or employment, as a reward to secure my appointment or confirmation thereof, so help me God.

/s/ Norman R. Lee
Affiant's Signature

Senior Justice	Houston, Harris
Position to Which Appointed	City and/or County

SWORN TO and subscribed before me by affiant on this 22nd day of June, 2000.

/s/ Charlene A. Mitchell
Signature of Person Authorized to Administer Oaths/Affidavits

/s/ Charlene A. Mitchell	NOTARY
Printed Name	Title

[SEAL]
CHARLENE A. MITCHELL
NOTARY PUBLIC,
STATE OF TEXAS
MY COMMISSION EXPIRES
AUG. 12, 2002

In the name and by the authority of

The State of Texas

OATH OF OFFICE

I, NORMAN R. LEE, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of SENIOR JUSTICE of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State, so help me God.

/s/ Norman R. Lee
Affiant

SWORN TO and subscribed before me by affiant on this 13th day of July, 2000.

/s/ Sam Alfano
Signature of Person
Administering Oath

(Seal)

/s/ Sam Alfano
Printed Name

Municipal Court Judge City of
Houston Harris County, TX.
Title

(SEAL)

STATEMENT OF APPOINTED OFFICER

(Pursuant to Tex. Const. art. XVI, §1(d), amended 1989)

(Filed in the Office of Secretary of State Jun. 12 2000
Statutory Filings Division Statutory Documents)

I, Ross A. Sears, do solemnly swear (or affirm), that I have not directly or indirectly paid, offered, promised to pay, contributed, or promised to contribute any money, or valuable thing, or promised any public office or employment, as a reward to secure my appointment or confirmation thereof, so help me God.

/s/ Ross A. Sears
Affiant's Signature

Senior Appellate Justice	Houston, TX
Position to Which Appointed	City and/or County

SWORN TO and subscribed before me by affiant on this 9th day of June, 2000.

/s/ Stephanie J. Billings
Signature of Person Authorized to Administer Oaths/Affidavits

/s/ Stephanie J. Billings	Notary Public
Printed Name	Title

[SEAL]
STEPHANIE J. BILLINGS
NOTARY PUBLIC,
STATE OF TEXAS
MY COMMISSION EXPIRES
FEB. 1, 2003

In the name and by the authority of

The State of Texas

OATH OF OFFICE

I, Ross A. Sears, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of Senior Appellate Justice of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State, so help me God.

/s/ Ross A. Sears
Affiant

SWORN TO and subscribed before me by affiant on this 28th day of June, 2000.

/s/ Dana C. Thomas
Signature of Person
Administering Oath

[SEAL] DANA C. HARVEY
NOTARY PUBLIC
State of Texas
Comm. Exp. 08-07-2001

/s/ Dana C. Thomas
Printed Name

Notary
Title

(6)

Supreme Court, U.S.
FILED
[illegible] 14 2002
CLERK

No. 01-0981

In The

Supreme Court of the United States

WARD S. LARKIN,

Petitioner,

vs.

MICHAEL JOHNSON and CompUSA, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Texas Court Of Appeals For The Fourteenth Judicial District Of Texas

REPLY TO RESPONDENT JOHNSON'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WARD LARKIN
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CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., art. VI, cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

Reply to Respondent Michael Johnson's Brief in Opposition to Larkin's Petition for Writ of Certiorari.

Petitioner Ward S. Larkin ("Larkin") submits his Reply Brief to Respondent Michael Johnson's ("Johnson") Brief in Opposition to Larkin's Petition for Writ of Certiorari[1] ("Petition"). A new point that Johnson raised in his brief in opposition was that Larkin only pleaded claims under the Texas common law. This argument fails. Larkin did properly brief the Texas courts, at all levels, on the important federal question of the Fighting Words Doctrine. [See Petition pages 5-8.] The Texas courts were in error not to have addressed it. The Texas courts' decision to grant Johnson summary judgment is in conflict with *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), and progeny. Also, the very veracity of Johnson's brief in

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[1] As the Brief in Opposition for CompUSA raises no new points under the question presented in the Petition, no reply to CompUSA is necessary or appropriate.

opposition, and the veracity of his assertions, allegations, and other factual contentions, are highly suspect.

ARGUMENT

1. Johnson's argument that Larkin only pleaded claims under the Texas common law is without merit.

Johnson is correct that the only issue he asserted when he filed his motion for summary judgment was his entitlement to qualified official immunity under Texas State law. However, Johnson's argument that the Texas courts were correct to render judgment based solely on Texas common law was faulty. Article VI, Clause 2 of the Constitution of the United States of America provides that "the Laws of the United States . . . shall be the supreme Law of the Land." State courts are "not to decide merely according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States – 'the supreme law of the land.' " *Martin v. Hunter's Lessee*, 14 U.S. 304, 340-41 (1816). The State courts must apply federal law when it is applicable and disregard state law when there is a conflict. Federal law includes not only the Constitution, treaties and legislation enacted by the U.S. Congress, but also the interpretations of their meaning by the United States Supreme Court. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

Larkin did properly brief the Texas courts on the important federal question of the Fighting Words Doctrine. [See Petition, pages 5-8.] Larkin explained how the Texas courts were to apply this Court's precedent in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) and

Gooding v. Wilson, 405 U.S. 518 (1972) to Disorderly Conduct under *Tex. Penal Code Ann.* § 42.01(a)(1). The Texas courts were in error not to have recognized and addressed it, for this single federal issue is that upon which this whole case balances.

However, though not specifically addressed by the Texas courts, and contrary to Johnson's assertion otherwise, the ultimate effect of granting summary judgment in this case was that the Texas courts did make a decision on the federal question of the Fighting Words Doctrine, a decision that is repugnant to *Chaplinksy* and *Gooding*. Precisely, the Texas courts decided that "What the hell are you doing?" spoken in a "slightly louder than conversational"[2] tone of voice are "fighting words" which by their very utterance tend to incite an immediate breach of the peace.

Specifically, by granting Johnson summary judgment the Texas courts decided that Johnson was entitled to qualified official immunity as a matter of law. Summary judgment is only appropriate when, as a matter of law, there are no genuine issues of material fact. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548 (Tex. 1985). Consequently, by deciding that Johnson was entitled to qualified official immunity, the Texas courts therefore

---

[2] In his brief in opposition Johnson exaggerated Larkin's Statement of the Case by stating that Larkin "admitted that the volume of the statements directed at Deputy Johnson were 'louder than conversation'." [See Johnson's brief in opposition, page 1.] The Petition page 3 accurately provides that Larkin's tone of voice was "slightly louder than conversational". Larkin's use of the qualification "slightly" was true, correct and a distinction that Johnson shouldn't have overlooked.

also decided, as a matter of law, that Johnson acted in good faith. Government officials in Texas are entitled to qualified official immunity from suit arising from discretionary acts made within the scope of their authority when performed in good faith. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). Consequently, by deciding that Johnson acted in good faith, the Texas courts therefore also decided, as a matter of law, that under the same circumstances a reasonably prudent police officer might have felt justified in detaining Larkin for Disorderly Conduct under *Tex. Penal Code Ann.* § 42.01(a)(1). It is considered a good faith act if a reasonably prudent officer might have believed that the detention was justified under the same or similar circumstances. See *Chambers*, 883 S.W.2d at 656. Consequently, by deciding that Johnson was reasonably prudent in his detention of Larkin, the Texas courts therefore also decided, as a matter of law, that "What the hell are you doing?" (Johnson's sole objective fact[3]) is speech that constitutes a violation of *Tex. Penal Code Ann.* § 42.01(a)(1). To justify any detention an officer must "have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Brown v. Texas*, 443 U.S. 47, 51 (1979). Consequently, by deciding that "What the hell are you doing?" is objectively speech that violates *Tex. Penal Code Ann.* § 42.01(a)(1), the Texas courts therefore also decided, as a matter of law, that "What the hell are you doing?"

---

[3] Johnson's impressions about Larkin's and the people in the vicinity's actions or reactions (1) are not objective facts, and (2) are not elements of *Tex. Penal Code Ann.* § 42.01(a)(1).

constitutes fighting words. *Tex. Penal Code Ann.* "[§] 42.01(a)(1) applies only to 'fighting words' which by their very utterance tend to incite an immediate breach of the peace as required by *Chaplinsky v. New Hampshire,* 315 U.S. 568." *Duran v. Furr's Supermarkets, Inc.,* 921 S.W.2d 778, 785 (Tex. App. – El Paso 1996, writ denied).

The Texas courts' decision becomes even more revolting since Larkin asked "What the hell are you doing?" while asserting his Texas statutory right of Protection of One's Own Property under *Tex. Penal Code Ann.* § 9.41(a). Johnson had both marked on and tried to take Larkin's receipt without consent. [See Petition page 15.]

2. The veracity of Johnson's Brief in Opposition is highly suspect.

In his brief in opposition Johnson states that he generally agrees that the Petition's "Statement of the Case" is accurate. Johnson does, however, point out some discrepancies that he felt were worth noting.[4] [See brief in opposition, pages 1-2.] Most important is what's not included on this list of discrepancies. Specifically, what Larkin said to Johnson when Johnson marked on and tried to take Larkin's receipt: "What the hell are you doing?" [See

---

[4] It's interesting that the first such discrepancy deals with a fact that Johnson had earlier conceded. On page 1 of his brief in opposition Johnson objects to Larkin having stated at page 5 in the Petition that "the charges against Larkin were dismissed for insufficient evidence." But in his motion for summary judgment Johnson had already accepted this fact: "The charges [against Larkin] were thereafter dismissed for lack of evidence." [See Clerk's Record (CR) pg. 16.]

Petition pg. 3.] By not objecting to this fact, Johnson is accepting it as true, which adds another inconsistency to Johnson's assertions, allegations, and other factual contentions in the case.

In Johnson's motion for summary judgment he argued that Larkin "exclaimed in a loud voice 'what the hell are you doing, Mother Fucker.' " [See CR 14.] Johnson's expert witness Mike Faas, a Deputy – Instructor at the Harris County, Texas Sheriff's Department Academy – overwhelmingly based his expert opinion in support of summary judgment on the premise that Larkin had used the term "motherfucker". [See CR pages 146-148.] In his deposition Johnson declared that he couldn't recall what Larkin said, but he did declare that he trusted what was written in his original arrest report, reading the pertinent portion into deposition testimony: "Mr. Larkin stated, 'What the hell are you doing, mother fucker'?" [See CR 167.] However, the arrest report itself was not entered into summary judgment evidence.

Conversely, Johnson declared in his affidavit presented in support of his motion for summary judgment that Larkin said, "What the hell are you doing, that's my receipt!" [See CR 152-154.] This coincides substantively with "What the hell are you doing?" If Johnson now accepts either of these as true, then Johnson's brief in opposition should have corrected or withdrawn all of the associated false allegations and false evidence in the case. Johnson should have admitted and corrected the factual errors in his motion for summary judgment. He should have asked this Court to withdraw consideration for Mike Faas' expert witness testimony, for conclusions based on false premises are simply unreliable.

In addition to these inconsistencies, although not on the record, but going strictly and solely to the veracity of Johnson's brief in opposition, is the fact that Johnson is no longer a Harris County, Texas deputy sheriff, but is instead a convicted felon. On February 22, 2001 he confessed to two counts of Aggravated Perjury under *Tex. Penal Code Ann.* § 37.03, Harris County Criminal Cause Numbers 859566 & 859567. On two separate occasions (February 3, 2000 and March 20, 2000) he knowingly presented false statements under oath with the intention to deceive in connection with and material to an official proceeding to determine probable cause for the issuance of a search warrant. On August 6, 2001 he was sentenced to two 10-year concurrent prison terms. On January 25, 2002 the trial judge suspended execution of his prison sentences, granting him shock probation.

Ultimately, if Johnson now accepts that Larkin simply said "What the hell are you doing," or even "What the hell are you doing, that's my receipt," then it's reasonable to infer (even without knowledge of Johnson's predilection for perjury) that Johnson deliberately filed a false arrest report against Larkin. In ***Rhetoric,*** his treatise on the art of persuasive oratory, Aristotle states in Chapter I, Book 14 that "it is argued that a man who will commit a crime in a law-court [for example, as perjurers do] would commit it anywhere."

Respectfully submitted,

WARD LARKIN
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